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# In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1661

J. L. SIMMONS COMPANY, INC., et al.,
*Petitioners,*

vs.

STATE OF ILLINOIS and JOHN E. SARBAUGH, Chief, Midwest Office, Antitrust Division of the United States Department of Justice,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RICHARD A. MAKARSKI
STANLEY B. BLOCK
ALLAN E. LAPIDUS
Suite 1600
111 W. Monroe Street
Chicago, Illinois 60603
*Attorneys for Petitioners*

*Of Counsel:*
MARK P. COHEN
CHAPMAN and CUTLER
Suite 1600

VEDDER, PRICE, KAUFMAN & KAMMHOLZ
Suite 3000
Harris Bank Building
111 W. Monroe Street
Chicago, Illinois 60603

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

## INDEX TO PETITION


| | PAGE |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Rules and Statute Involved | 3 |
| Statement of the Case | 4 |
| Reasons for Granting the Writ | 10 |
| Conclusion | 23 |
| Appendix A—Opinion of the Court of Appeals for the Seventh Circuit | A1 |
| Order Staying Mandate | A19 |
| Appendix B—Opinion of the District Court for the Eastern District of Illinois | B1 |


## TABLE OF AUTHORITIES

CASES:


| | |
|---|---|
| Alexander v. United States, 201 U.S. 117, 50 L.ed. 686 (1906) | 20 |
| Baker v. United States Steel Corporation, 492 F.2d 1074 (2d Cir. 1974) | 11, 12, 13, 22 |
| Carter Products, Inc. v. Eversharp, Inc., 360 F.2d 868 (7th Cir. 1966) | 21 |

PAGE

Caswell v. The Manhattan Fire & Marine Insurance Co., 399 F.2d 417 (5th Cir. 1968) ..... 20

Cobbledick v. United States, 309 U.S. 323, 84 L.ed. 783 (1940) ..... 19, 20

Dennis v. United States, 384 U.S. 855, 16 L.ed. 2d 973 (1966) ..... 16

Hancock Brothers, Inc. v. Jones, 293 F.Supp. 1229 (N.D. Cal. 1968) ..... 18

Horizons Titanium Corporation v. Norton Company, 290 F.2d 421 (1st Cir. 1961) ..... 21

Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 3 L.ed. 2d 1323 (1959) ..... 15, 16, 17

Premium Service Corp. v. Sperry & Hutchinson Co., 511 F.2d 225 (9th Cir. 1975) ..... 21

Republic Gear Company v. Borg-Warner Corporation, 381 F.2d 551 (2d Cir. 1967) ..... 21

Ryan v. Commissioner, 517 F.2d 13 (7th Cir.), *cert. denied* 423 U.S. 892 (1975) ..... 20, 21

Shattuck v. Hoegl, 523 F.2d 509 (2d Cir. 1975) ..... 21

Texas v. United States Steel Corp., 546 F.2d 626 (5th Cir. 1977) ..... 10

United States v. Jackson, 390 U.S. 570, 20 L.ed. 2d 138 (1968) ..... 17

United States v. Procter & Gamble Co., 356 U.S. 677, 2 L.ed. 2d 1077 (1958) ..... 17



PAGE

STATUTES:

Section 1 of the Sherman Act, 15 U.S.C. §1 ..... 4

28 U.S.C. §1254(1) ..... 2

28 U.S.C. §1291 ..... 2, 4, 18

28 U.S.C. §1292(b) ..... 22

28 U.S.C. §2102(c) ..... 2

RULES:

Federal Rule of Civil Procedure 45 ..... 18

Federal Rule of Criminal Procedure 6(e) ..... 3

Federal Rule of Criminal Procedure 16(a)(1)(A) .... 2, 3, 11, 17

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioners, J. L. Simmons Company, Inc., *et al.*,*

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* This Petition for a Writ of Certiorari is joined in and submitted on behalf of the following Petitioners in addition to the J. L. Simmons Company, Inc., who, with the exception of Franklin-Cress Construction Company, are all of the Intervenors-Appellees in the Court of Appeals below: Shappert Engineering Company; A. J. Walker Construction Company; Champaign Asphalt Company; Howell Asphalt Company; Huckaba & Sons Construction Company; Neal Lentz Construction, Inc.; Sangamo Construction Company; and Shoemaker Bridge Company.

respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 8, 1977.

## OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto at pages A1-A19. The unreported opinion of the District Court, which was reversed by the Court of Appeals, appears in Appendix B hereto at pages B1-B21.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 8, 1977, and an order staying the Court's mandate was entered on April 26, 1977. No petition for a rehearing was filed, and this petition for certiorari was timely filed pursuant to 28 U.S.C. §2101(c) within 90 days of the entry of judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether grand jury transcripts should be disclosed for purposes of discovery in a civil antitrust action merely because a corporate employer of the grand jury witness whose transcript is sought had obtained a copy of that transcript pursuant to Federal Rule of Criminal Procedure 16(a)(1)(A) in the preparation of that corporation's defense in a prior criminal anti-trust proceeding, and where there has been no demonstration of compelling need?

2. Whether an order of the United States District Court for the Eastern District of Illinois denying discovery of transcripts of a grand jury empanelled in that district for use in connection with a civil antitrust proceeding pending in the District Court for the Southern District of Illinois is a final appealable order under 28 U.S.C. §1291?



## RULES AND STATUTE INVOLVED

Federal Rule of Criminal Procedure 6(e):

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

Federal Rule of Criminal Procedure 16(a)(1)(A):

> Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before

a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

28 U.S.C. §1291:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

## STATEMENT OF THE CASE

On December 19, 1972, a grand jury which had been empanelled in the Eastern District of Illinois to investigate possible violations of the antitrust laws in the highway construction industry in Illinois returned a one-count criminal indictment charging nine companies and four individuals with violation of Section 1 of the Sherman Act (15 U.S.C. §1), resulting in an action entitled *United States* v. *Champaign Asphalt Company et al.*, CR 72-67-D (E.D. Ill. 1972). In connection with this criminal action, on January 22, 1973, Chief Judge Henry S. Wise, pursuant to Federal Rule of Criminal Procedure 16(a)(1)(A),



ordered the Department of Justice to permit the attorneys for each of the corporate defendants to inspect and copy the transcripts of the grand jury testimony of present or former employees of each corporation who had power to bind the corporation with respect to business activity which was the subject of the indictment, and some disclosure was made pursuant to this order. Subsequently, all the defendants entered pleas of *nolo contendere* which were accepted, and judgments were entered and sentences imposed. The grand jury has long since been discharged.

On November 7, 1973, the State of Illinois filed in the Southern District of Illinois a civil treble damage antitrust action entitled *Illinois* v. *Champaign Asphalt Co., et al.*, S-CIV-73-216 (S.D. Ill. 1973) and which is currently still pending before that Court. The civil antitrust action charges the same nine companies that had been defendants in the criminal action plus five additional highway construction companies with the same combination, conspiracy and activity alleged in the criminal indictment.*

In order to facilitate general discovery in its civil antitrust case, the State on July 26, 1974 petitioned the District Court for the Southern District of Illinois for an

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* The following nine companies were defendants in the criminal action and are now defendants in the civil antitrust action: Champaign Asphalt Company; Culbertson Construction Company, Inc.; LaNeil Construction Company, Inc.; Neal Lentz Construction, Inc.; O'Neil Brothers Construction Company; Shappert Engineering Company, Inc.; Shoemaker Bridge Company; J. L. Simmons Company, Inc.; and A. J. Walker Construction Company.

The following five additional companies are defendants only in the civil antitrust action: Franklin-Cress Construction Company; Howell Asphalt Company; Huckaba & Sons Construction Company; Sangamo Construction Company; and The Standard Paving Company.

order requiring John E. Sarbaugh, Chief of the Midwest Office of the Antitrust Division of the Department of Justice, whose office had conducted the prior grand jury proceedings and criminal action, to produce for inspection and copying grand jury transcripts which had been disclosed to any defendant in the criminal proceeding in the Eastern District, to any defendant in the civil case, or to any person not an attorney or staff member of the Department of Justice. The State also served a request to produce copies of the transcripts on each of the defendants in the civil case and subsequently sought an order compelling production of the copies. The District Court for the Southern District of Illinois denied the State of Illinois' petition, holding that the transcripts were outside the jurisdiction of that Court because they related to a grand jury proceeding in another district. The Court added:

> No expression is intended by this Order on the merits of those requests, only on the matter of the jurisdiction of this Court.

The State of Illinois then petitioned the District Court for the Eastern District of Illinois to require John E. Sarbaugh to produce the grand jury transcripts, and to also produce grand jury subpoenas and documents which had been collected by the Eastern District grand jury in connection with its highway industry investigation. John E. Sarbaugh, on behalf of the Antitrust Division, filed a response raising no objection to the requested production. Consequently, on January 14, 1976, Chief Judge Wise entered an order which in pertinent part provided as follows:

> NOTICE IS HEREBY GIVEN and IT IS ORDERED that all corporate and individual defendants in the above-entitled cause file responses, if any, if they so desire, to said petitions and memoranda in support thereof on or before February 4, 1976. . . .



In response to Chief Judge Wise's order, J. L. Simmons Company and Shappert Engineering Company, defendants in both the prior criminal proceeding and the pending civil action, filed memoranda in opposition to the production of the grand jury transcripts and the production of the other grand jury materials. At the hearing on the State's petition held before Chief Judge Wise on February 26, 1976, other defendants in the criminal and civil cases joined J. L. Simmons Company and Shappert Engineering Company during oral argument before the Court in opposing the production of the grand jury transcripts. No objection was made by the State to the intervention by the defendants.

On May 7, 1976, Chief Judge Wise entered his Memorandum Opinion and Order (Appendix B at B1) which denied in all respects the State's request for grand jury materials. (Although the Memorandum Opinion bears the date April 7, 1976, it was in fact filed on May 7, 1976.) With respect to the disclosure of the grand jury transcripts, the District Court held:

> None of this is to say, however, that where the reasons for secrecy are minimal the civil litigant has a *right* to the disclosure of grand jury minutes. Such a practice would detract from the efficacy of the grand jury proceedings . . . . (Mem. Op., Appendix B at B13.)
>
> * * *
>
> This Court will therefore decline to exercise its discretion in favor of releasing grand jury transcripts on the basis of an anticipated need for use in the discovery stage of the proceedings. (Mem. Op., Appendix B at B17-B18.)

On June 4, 1976, the State filed a Notice of Appeal from only that part of the order of Chief Judge Wise which denied to the State of Illinois access to the grand jury transcripts. Subsequently, the defendants in the civil case filed Motions to Dismiss the Appeal on the ground that the order of the District Court for the Eastern District of Illinois was not a final appealable order, and the State moved to strike the appearances of the civil defendants as not proper parties to the appeal. The Court of Appeals then directed that the Motions to Dismiss the Appeal and the Motion to Strike Appearances of the defendants in the civil case be taken with the merits.

On April 8, 1977, the Court of Appeals reversed the order of the District Court for the Eastern District of Illinois that had refused to permit inspection and copying of grand jury transcripts, and remanded the case to the District Court for further proceedings consistent with its opinion. In so deciding, the Court of Appeals held:

1. That the defendants in the civil antitrust case pending in the Southern District of Illinois were properly intervenors in the proceedings in the Eastern District of Illinois and therefore were proper parties-appellees to the appeal (Appendix A at A8);

2. That the order of the District Court for the Eastern District of Illinois denying disclosure of the grand jury transcripts was a final appealable order (Appendix A at A9);

3. That the grand jury transcripts may be disclosed for use in the civil antitrust case, and the requisite need to impinge on grand jury secrecy has been demonstrated, "if the corporate employer of the grand jury witness whose transcript is sought has obtained a copy of that transcript,



and the witness is scheduled to be called to give testimony either at trial or by deposition on the matters about which he testified before the grand jury." (Appendix A at A16).

On April 26, 1977, as the result of motions filed by Intervenors-Appellees J. L. Simmons Company, Inc. and Shappert Engineering Company, the Court of Appeals stayed the issuance of its mandate, pursuant to Federal Rule of Appellate Procedure 41(b), pending the timely filing of this Petition for a Writ of Certiorari (Appendix A at A19).

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO WHETHER GRAND JURY TRANSCRIPTS SHOULD BE DISCLOSED FOR PURPOSES OF GENERAL DISCOVERY IN CIVIL PROCEEDINGS.

The Court of Appeals for the Seventh Circuit recognized that its opinion was in conflict with decisions of other Courts of Appeals. At page 16n.15 of its slip Opinion, the Court stated (Appendix A at A18):

> In view of the inconsistency between our views on the issues on intervention and appealability and on the merits and those expressed in certain opinions of other circuits, this opinion has been circulated among all judges of this court in regular active service. Judge Wood disqualified himself from any consideration of this case. No judge favored a rehearing in banc on any issue.

The Court below held that a particularized need for the disclosure of the grand jury transcripts for use in the civil antitrust case has been sufficiently shown "if the corporate employer of the grand jury witness whose transcript is sought has obtained a copy of that transcript, and the witness is scheduled to be called to give testimony either at trial or by deposition on the matters about which he testified before the grand jury. (Appendix A at A16). The Court of Appeals reached this result despite the fact that the grand jury transcripts were sought by the State in connection with pretrial discovery proceedings and without any showing whatsoever that the transcripts were needed to impeach a witness or to refresh the recollection of a witness, or that other avenues of discovery were closed. The Court of Appeals believed its holding to be in line with what it felt to be the minimal reasons for maintaining grand jury secrecy in the case before it.



In so holding, the Seventh Circuit adopted a position in direct conflict with that taken by the Fifth Circuit in *Texas* v. *United States Steel Corporation,* 546 F.2d 626 (5th Cir. 1977). In that case, each corporate defendant in the prior criminal action had obtained transcripts of grand jury testimony of its own employees pursuant to a motion filed in the criminal action under Federal Rule of Criminal Procedure 16(a)(1)(A). As part of its discovery program in its civil antitrust case, the State of Texas moved to discover those transcripts. The Fifth Circuit reversed the District Court's order granting disclosure, holding that "[t]he general circumstance that another party has his own or his employees' transcript in his possession does not, standing alone, establish particularized need sufficient to overcome the need for grand jury secrecy." 546 F.2d at 631. The Fifth Circuit based its holding on the policy reasons behind grand jury secrecy, stating that "'he one most pertinent to this case is the desire to create a sanctuary, inviolate to *any* intrusion except on proof of some special and overriding need, where a witness may testify, free and unfettered by fear of retaliation." 546 F.2d at 629. Thus, the conflict between the Seventh Circuit and Fifth Circuit is complete.

The opinion of the Court of Appeals below is also in conflict with the decision of the Second Circuit in *Baker* v. *United States Steel Corporation,* 492 F.2d 1074 (2d Cir. 1974), although its holding with respect to the disclosure of grand jury transcripts may technically be labeled as *dicta.* In *Baker,* a private civil antitrust suit was filed in the District of Connecticut. This civil suit resulted from a criminal indictment against the same defendants which had been filed in the Southern District of New York and which was terminated by pleas of *nolo contendere.* The plaintiffs in the civil action in Connecticut sought transcripts of testimony given by witnesses before the grand

jury in the New York District, who at the time of testifying were officials of the defendants, but who at the time of the civil action were deceased.

Although the plaintiffs were unable to demonstrate a compelling need for the transcripts, they succeeded in persuading the Connecticut District Court that the compelling need test should not be applied. Lacking custody or control over the New York District's grand jury minutes, the Connecticut District Court requested the New York District Court to forward the grand jury transcripts to it. After a hearing on the request before the New York District Court, that Court agreed to honor the request. The defendants then appealed both the New York District Court's decision to honor the request, and the Connecticut District Court's decision to release the grand jury transcripts.

In a 2-1 decision, the Second Circuit dismissed the appeals, holding that neither decision was a final appealable order. The Second Circuit, however, did not want the dismissal of the appeals to be construed as approval of the Connecticut District Court's reasons for releasing the transcripts, and the majority requested that District Court to reconsider its ruling. The Court stated at 492 F.2d at 1079:

> Having in mind that disclosure of grand jury proceedings may substantially inhibit the deliberations of other grand juries and the willingness of witnesses to appear and testify freely in the future, we would not want our dismissal of these appeals to be construed as approval of the standard of "slight need" formulated by the district court. . . . [I]t seems to us that where plaintiffs' predicament is to such a large extent of their own making and the use to which they could put the transcripts so speculative, greater weight should be given to the fact that, while some of the reasons for maintaining secrecy no longer exist in this



case, other traditional reasons survive. As the Supreme Court stated in *United States* v. *Procter & Gamble Co., supra,* for instance, the institution of the grand jury "might suffer if those testifying today knew that . . . their testimony would be lifted tomorrow," 356 U.S. at 682, 78 S.Ct. 986. For the most part the decisions relied upon by the district court in support of its new "slight need" standard reveal the existence of more specific, forceful and persuasive exigencies than those shown here, which were described by the courts in terms of compelling or particularized need. For instance, disclosure has been permitted to enable counsel to perform the vital function of cross-examining a witness who is obligated for other reasons to testify publicly with respect to the same matters which were the subject of his grand jury testimony. . . . No such situation exists here. Nor do these authorities support the proposition that grand jury transcripts should be released to permit *general discovery* in a civil case, as distinguished from satisfying the compelling need for impeachment or refreshment of a witness' recollection, without any showing that other possible sources have been exhausted or that the transcripts, if disclosed, would not be publicized.

While dissenting Judge Lumbard disagreed with the majority and believed that the order of the District Courts were final and appealable, he was in full agreement with the majority that it was improper for the Connecticut District Court to order release of the grand jury testimony. Judge Lumbard stated at 492 F.2d at 1080:

> The majority agrees that it was improper for Judge Newman to order the release of secret grand jury testimony here simply on the showing of a "slight need" for such testimony by the plaintiffs. While the "particularized need" test of *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400, 79 S.Ct. 1237, 3 L.ed. 2d 1323 (1959) and *United States* v. *Procter & Gamble Co.,* 356 U.S. 677, 682-683, 78 S. Ct. 983,

2 L.ed. 2d 1077 (1958), has been eroded to some extent, no previous decision of this court has endorsed a standard which would permit the breach of grand jury secrecy merely for general discovery purposes. Such a lenient standard would seriously jeopardize the effective functioning of grand juries. Ready access to grand jury minutes would likely have the effect in the future of substantially inhibiting the deliberations of the grand jury, and, perhaps more significant, the willingness of witnesses to appear and testify freely. With these consequences in mind, this court has required a showing of exigent circumstances before overriding the strong policy in favor of grand jury confidentiality. See, e.g., *United States* v. *Youngblood*, 379 F.2d 365, 367 (2d Cir. 1967), *Atlantic City Electrical Co.* v. *A. B. Chance Co.*, 313 F.2d 431, 434 (2d Cir. 1963).

The plaintiffs have failed to point to such exigent circumstances here in support of disclosure. They seek to use secret grand jury testimony to obtain "leads" to competent evidence that could then be used in this civil suit against the defendants. No showing, however, has been made that the usual channels of discovery have proved fruitless or have even been diligently pursued. As the majority notes, plaintiffs have yet to exhaust "the deposing of other live and available witnesses who might provide the 'leads' plaintiffs seek to gain from disclosure of the grand jury testimony of the deceased officials."

Since the plaintiffs sought the grand jury transcripts of witnesses who were deceased, under the Seventh Circuit's reasoning, the policy reasons behind grand jury secrecy would not be applicable, and thus, the grand jury transcripts would be discoverable. Nonetheless, the Second Circuit concluded that the transcripts should not be



disclosed. Its decision, therefore, is in conflict with the decision of the Court of Appeals below and in agreement with the decision for the Fifth Circuit.

These conflicts justify the grant of certiorari to review the judgment below.

## II.

## THE DECISION BELOW HOLDING THAT GRAND JURY TRANSCRIPTS SHOULD BE DISCLOSED FOR PURPOSES OF DISCOVERY IN CIVIL PROCEEDINGS INVOLVES IMPORTANT AND RECURRING QUESTIONS CONCERNING THE SECRECY OF GRAND JURY PROCEEDINGS AND CONCERNING THE ROLE OF THE GRAND JURY WHICH THIS COURT SHOULD RESOLVE.

The decision below fails to follow the policy of grand jury secrecy and the role set out for the grand jury by this Court's decision in *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395, 3 L.ed. 2d 1323 (1959). In that case, the defendants, who were convicted on a single-count indictment charging a conspiracy under §1 of the Sherman Act, contended that the trial court erred in refusing to permit them to inspect the grand jury minutes covering the testimony before that body of a key government witness at the trial.

The defendants contended that they had a right to the grand jury testimony, but this Court affirmed their conviction, concluding that there was no right to the grand jury transcript in the absence of a showing of a compelling need, because to grant such a right would "inevitably detract from [the grand jury's] efficacy." 360 U.S. at 400, 3 L.ed. 2d at 1327.

The Court reached this result over the dissent of four members of the Court led by Mr. Justice Brennan, who argued that because the witness whose grand jury testimony was sought had testified in open court at the trial of the defendants, none of the policy reasons behind grand jury secrecy was applicable in that particular instance, and therefore the grand jury transcripts should be disclosed. The majority of the Court, however, gave more concern to the effective functioning of future grand juries.

The Court of Appeals below and other courts believe that this Court's decision in *Pittsburgh Plate Glass* has been eroded by language in *Dennis* v. *United States,* 384 U.S. 855, 16 L.ed. 2d 973 (1966) and by decisions of lower federal courts. While this Court's decision in *Pittsburgh Plate Glass* should have controlled the decision below, this Court has not had occasion to address the precise issue presented in this case, and has not since 1966 had occasion to address itself to the disclosure of grand jury transcripts in general. As a result, in addition to the conflict between the Circuits referred to in Part I above, the issue of disclosure of grand jury transcripts often arises in the lower courts.

It is a common occurrence for private civil antitrust actions to follow on the heels of criminal antitrust actions. As a result, the issue of disclosure of grand jury transcripts poses a recurring problem which has not been, but should be, settled by this Court. The case below raises the following significant questions of federal law:

1. To what extent does the disclosure of grand jury transcripts for discovery purposes and without a demonstration of a compelling necessity impair the effective functioning of future grand juries and lead to an abuse of the grand jury function?



As this Court has recognized in *Pittsburgh Plate Glass, supra,* and *United States* v. *Procter & Gamble Co.,* 356 U.S. 677, 2 L.ed. 2d 1077 (1958), one of the purposes behind grand jury secrecy is to encourage witnesses to step forward and testify freely, and the grand jury is free from technical rules and may return indictments based on hearsay. The decision of the Court of Appeals for the Seventh Circuit undermines the effective functioning of future grand juries because testimony of witnesses will be parsimonious and curtailed when they know that their testimony will be in the hands of civil antitrust plaintiffs without any showing of need.

2. Does the disclosure of grand jury transcripts impermissibly hinder a criminal corporate defendant's right to employ the discovery procedures of Federal Rule of Criminal Procedure 16(a)(1)(A) and also unconstitutionally hinder a criminal corporate defendant's right to counsel?

Under Federal Rule of Criminal Procedure 16(a)1(A), a corporate defendant is entitled to inspect the grand jury testimony of any witness who was, at the time of his testimony, so situated as an officer or employee as to have been able to legally bind the corporation with respect to the business activity which is the subject of the indictment. The decision of the Court below abrogates this right granted to the corporation by Congress because to look at the transcripts in preparation of a criminal defense is to turn the transcripts over to civil antitrust plaintiffs. And by so denying the criminal corporate defendant the right to inspect the grand jury transcripts in preparation for its defense, the decision of the Court of Appeals also impermissibly burdens the criminal corporate defendant's constitutional right to effective assistance of counsel. *See United States* v. *Jackson,* 390 U.S. 570, 20 L.ed.2d 138 (1968); *Hancock Brothers, Inc.* v. *Jones,* 293 F.Supp. 1229 (N.D. Cal. 1968).

These reasons further justify the issuance of a writ of certiorari to review the judgment below.

## III.

## THE DECISION BELOW THAT THE ORDER OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF ILLINOIS IS A FINAL, APPEALABLE ORDER IS AN ERRONEOUS DECISION OF AN IMPORTANT QUESTION OF FEDERAL LAW CONCERNING THE JURISDICTION OF FEDERAL COURTS OF APPEALS AND THE FEDERAL POLICY AGAINST PIECEMEAL REVIEW.

The decision below has held that the order of the District Court for the Eastern District of Illinois denying discovery of the grand jury transcripts for use in connection with the civil proceeding pending in the Southern District of Illinois is a final order, and therefore appealable as a final decision under 28 U.S.C. §1291. Under the Seventh Circuit's decision, therefore, an order denying discovery entered by a district court which is in a different district from that in which the main action is pending, but which is nevertheless within the same appellate circuit, is a final appealable order, even though review of the order may be had by the appellate court at the conclusion of the proceedings in the district where the main action is pending.

It is often the case that discovery is sought from a witness or other person who resides, transacts business or is employed in a district different from the one in which the main proceeding is pending, and therefore under Federal Rule of Civil Procedure 45 outside the jurisdiction for discovery purposes of the district court where the main proceeding is pending. Under the decision below, every



order denying discovery entered by a district court within the same appellate circuit as the district in which the main proceeding is pending will be appealable as a final order even though the main action has not been concluded. As a result, the effective conduct of litigation will be impaired by piecemeal appeals and the Court of Appeals will be further overburdened.

Accordingly, the decision of the Court of Appeals for the Seventh Circuit involves recurring and important questions of federal law concerning the jurisdiction of federal Courts of Appeals and the Congressional policy against piecemeal review. In *Cobbledick* v. *United States,* 309 U.S. 323, 324-25, 84 L.ed. 783, 785 (1940), this Court stated:

> Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. . . . [C]ongress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration.

This Court has not had occasion to address itself to the issue of appealability presented by this Petition, but prior decisions of this Court and of the federal Courts of Appeals demonstrate that the opinion below erroneously decided an important question of federal law.

The general rule is that the Courts of Appeals have jurisdiction to review orders or rulings by a district court made in connection with litigation pending before it only after the district court has made a final decision—that is, a decision that has disposed of the entire litigation pending

before the court. The reason behind this policy of finality is to achieve the effective conduct of litigation by avoiding piecemeal review. *Cobbledick* v. *United States, supra,* at 324-26, 84 L.ed. at 785.

Accordingly, if an order of a district court can be reviewed at the conclusion of the entire litigation, the policy behind the final decision rule requires that review wait until that time, and the order is therefore not considered to be a final appealable order. An order compelling or denying discovery of a *party* can be reviewed at the conclusion of the main litigation, and thus, it has been repeatedly held that such orders are interlocutory and not appealable. *Cobbledick* v. *United States, supra; Ryan* v. *Commissioner,* 517 F.2d 13, 18 (7th Cir.), *cert. denied* 423 U.S. 892 (1975); *Caswell* v. *The Manhattan Fire & Marine Insurance Co.,* 399 F.2d 417, 422 (5th Cir. 1968).

This federal policy against fragmentary review is a strong policy that is not easily overcome. For example, if a district court compels discovery of a non-party witness, no review of the order would be available at the conclusion of the main litigation because the witness would not be a party to the appeal. Nonetheless, the policy behind the final decision rule does not permit the non-party witness to take an immediate appeal. Rather, in order to overcome the policy against fragmentary appeals, the non-party witness must subject himself to a finding of contempt in order to obtain review of the discovery order through appeal of the contempt citation. *Alexander* v. *United States,* 201 U.S. 117, 50 L.ed. 686 (1906); *Ryan* v. *Commissioner, supra,* 517 F.2d at 19-20.

Orders denying discovery of non-party witnesses which have been entered by a district court of a district differ-



ent from the one in which the main proceeding is pending have been held to be final decisions for purposes of appeal. *Premium Service Corp.* v. *The Sperry & Hutchinson Co.,* 511 F.2d 225 (9th Cir. 1975); *Republic Gear Company* v. *Borg-Warner Corporation,* 381 F.2d 551 (2d Cir. 1967); *Carter Products, Inc.* v. *Eversharp, Inc.,* 360 F.2d 868 (7th Cir. 1966); *Horizons Titanium Corporation* v. *Norton Company,* 290 F.2d 421 (1st Cir. 1961). That holding, however, has arisen in the situation where the district of the district court denying discovery is outside the appellate circuit containing the district of the district court where the main proceeding is pending. In that situation, unless an appeal from the denial of discovery is allowed, the party seeking discovery would be precluded from obtaining any review because the appellate court which would review the main proceedings at their termination would be unable to review the order of that district court or to instruct that court because that district court would not be within the appellate court's jurisdiction. The above cases which have held an order denying discovery to be appealable in such a situation have been careful to clearly state that their opinions were limited to the situations where the district court denying discovery and the persons and materials sought were beyond the jurisdictional reach of the appellate circuit where the main proceeding was pending. See also *Shattuck* v. *Hoegl,* 523 F.2d 509, 514-15 (2d Cir. 1975); *Ryan* v. *Commissioner, supra,* 517 F.2d at 18.

In contrast to the situation described in the cases above, the situation presented to this Court is one in which both the district in which the main proceeding is pending and the district containing the district court in which the discovery was denied are within the same appellate circuit.

Consequently, there is no jurisdictional barrier which would have prevented the Court of Appeals below from reviewing the denial of discovery at the conclusion of the main litigation. Since review would be available at the conclusion of the main litigation in the Southern District, and the Court of Appeals would be able to instruct and direct the District Court for the Eastern District, the policy behind the final decision rule mandates that review wait until that time and that the order of the District Court for the Eastern District of Illinois be found not to be a final appealable decision. *Baker* v. *United States Steel Corp., supra,* 492 F.2d at 1078. As the Seventh Circuit itself noted at page 8 n.7 of its slip Opinion, the rationale of *Baker* on the issue of appealability "does not appear to be in harmony with the view we have adopted." (Appendix A at A9.)

The decision below fails to distinguish whether the district of the district court denying discovery is within or without the appellate circuit containing the district where the main proceeding is pending. The decision, therefore, raises the anomalous situation that where both district courts involved are within the same appellate circuit, in order to obtain review of an order granting disclosure, a non-party witness must bear the pain of contempt, but if disclosure is denied, the party seeking disclosure may without further burden immediately appeal. The final decision rule should not be interpreted to have such an inequitable impact, especially in light of the fact that certification of the denial of discovery could have been sought, but was not, pursuant to 28 U.S.C. §1292(b).

The decision below will impede the effective conduct of litigation and further burden an already overworked federal appellate court system. These are consequences the



final decision rule and the federal policy against piecemeal review were designed to avoid.

This Court should grant certiorari to review the decision of the Court below in order to correct and settle an important question of federal law.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

Richard A. Makarski
Stanley B. Block
Allan E. Lapidus
Suite 1600
111 W. Monroe Street
Chicago, Illinois 60603

*Of Counsel:*
Mark P. Cohen
Chapman & Cutler
Suite 1600

Vedder, Price, Kaufman & Kammholz
Suite 3000

Harris Bank Building
111 W. Monroe Street
Chicago, Illinois 60603

# APPENDIX

## APPENDIX A

In the

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 76-1690

STATE OF ILLINOIS,
*Petitioner-Appellant,*

*v.*

JOHN E. SARBAUGH, Chief, Midwest Office, Antitrust Division of the United States Department of Justice,
*Respondent-Appellee,*

J. L. SIMMONS COMPANY, INC., et al.,
*Intervenors-Appellees.*

Appeal from the United States District Court for the Eastern District of Illinois, Danville Division.
In re Grand Jury Proceedings
No. CR-72-67-D—HENRY S. WISE, *Judge.*

ARGUED DECEMBER 1, 1976—DECIDED APRIL 8, 1977

Before CUMMINGS and TONE, *Circuit Judges,* and GRANT, *Senior District Judge.**

TONE, *Circuit Judge.* This is an appeal from an order of the District Court for the eastern District of Illinois refusing to permit inspection and copying of grand jury transcripts. Inspection is sought by the State of Illinois,

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* The Honorable Robert A. Grant, Senior District Judge of the United States District Court for the Northern District of Indiana, is sitting by designation.

plaintiff in a private treble-damage antitrust action pending in the Southern District of Illinois, for use in connection with that action. Among the defendants in that action are nine corporations indicted by the Eastern District grand jury who, during the pendency of the now-concluded criminal action, obtained copies of the transcripts pursuant to Rule 16(a)(1)(A), Fed. R. Crim. P. We decide that those corporations may intervene in the proceeding, that the order denying inspection is appealable, and that the state should have access to the transcripts subject to certain conditions.

*The Criminal Case in the Eastern District*

The indictment in the Eastern District charged the corporate defendants, highway construction contractors, and four of their officers with violating § 1 of the Sherman Act, 15 U.S.C. § 1, by submitting rigged bids to the State of Illinois and allocating among the corporate defendants projects let by the state in connection with the construction of an interstate highway. The Eastern District court's inspection order directed the Department of Justice to permit the attorneys for each of the corporate defendants to inspect and copy the transcripts of the grand jury testimony of present or former employees of the corporation who had power to bind it with respect to business activity which was the subject of the indictment. Rule 16(a)(1)(A), Fed. R. Crim. P. Disclosure was made pursuant to the order. Subsequently all the defendants entered pleas of *nolo contendere,* which were accepted, and judgments were entered and sentences were imposed. The grand jury has long since been discharged.



*The Civil Case in the Southern District*

The state's treble-damage action in the Southern District was based on the same facts and sought recovery of overcharges resulting from the alleged conspiracy. In addition to the nine companies charged in the Eastern District indictment, five other highway construction companies were named as defendants. The state moved for an order requiring John E. Sarbaugh, Chief of the Antitrust Division's Midwest Office, to produce for inspection and copying grand jury transcripts which had been disclosed to any defendant in the criminal proceeding in the Eastern District, to any defendant in the civil case, or to any person not an attorney or staff member of the Department of Justice. The state also served a request to produce copies of the transcripts on each of the defendants in the civil case and subsequently sought an order compelling production of the copies. The court denied relief, holding that the transcripts were outside the jurisdiction of that court because they related to a grand jury proceeding in another district. The court added:

> "No expression is intended by this Order on the merits of those requests, only on the matter of the jurisdiction of this Court."

*The Proceeding Below*

The state then petitioned for the same relief against respondent Sarbaugh in the Eastern District, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure. His response to the petition raised no objection. The state served notice of this petition on the corporate defendants, and, upon their objections to disclosure, the District Court held a hearing at which the corporate defendants were

allowed, without objection, to appear and be heard. The District Court then, in the order appealed from, denied the petition, holding that the requisite particularized showing of compelling necessity had not been made. The court, however, ordered the transcripts transferred to the Southern District so they would be available for disclosure by that court if a sufficient showing of necessity were made during the trial.[1]

The court also denied a motion by the state for production of documents, in which it sought to inspect all subpoenas and documents in the custody of respondent Sarbaugh which had been collected by the Eastern District grand jury in connection with its highway industry investigation. Respondent Sarbaugh was ordered, however, to return all corporate documents in his possession to the defendants, so those documents would be available for discovery by the state.[2] The ruling on the motion to produce documents is not challenged on appeal.

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[1] The District Court said:

"The Court believes that it would be entirely proper for petitioner to move for production of the requested transcripts at the time of the trial of the civil suit to use for purposes of impeachment, refreshing recollection and challenging credibility of those witnesses who had previously testified before the grand jury. At that time petitioner would be in a position to establish compelling need, for example, by pointing to a failure of memory on the part of a witness, a showing of contradiction between the testimony and reliable documentary evidence or perhaps by prevailing upon the trial court for an *in camera* examination of the transcripts to uncover any inconsistencies."

[2] The policy of grand jury secrecy obviously had a much more limited application to the subpoenaed documents than it did to grand jury transcripts. See *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960).



The objectors, designating themselves intervenors and appellees, have moved to dismiss the appeal, and the state has moved to strike the appearances of the intervenors. Both motions were ordered taken with the merits.

Consistent with his position before the District Court, respondent Sarbaugh does not oppose the relief sought by the state. Only the intervenors oppose that relief.

I. *Intervention*[3]

The state contends that the corporations resisting disclosure of the transcripts should not be considered intervenors because they did not comply with the requirements of Rule 24(c), Fed. R. Civ. P., when they appeared in the District Court. Any right the state may otherwise have had to rely on this failure was lost, however, when it did not object on this ground in the District Court. *Cf. Klein* v. *Nu-Way Shoe Co.*, 136 F.2d 986, 989 (2d Cir. 1943); see 3B *Moore's Federal Practice* ¶ 24.12[1] at 24-504 (1975). In fact, in the District Court the state asserted no objection whatsoever to the intervenors' appearance. By notifying them of the petition, failing to object to the order inviting them to appear, and never raising any question of their right to appear, the state waived any objection to their intervention.

In any event, we think the objecting defendants were entitled to intervene. The Third Circuit reached the opposite result in a *per curiam* opinion in *United States* v.

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[3] Normally we would consider first the issue of our jurisdiction. Here, because the motion challenging the appealability of the District Court's order was filed by the intervenors, not the named defendant, it is convenient to consider their status before ruling on their motion. We would of course be required to consider the issue of our jurisdiction whether or not it was raised by a party.

*American Oil Co.*, 456 F.2d 1043, 1044 (1972), framing the issue as one of standing and stating that the criminal proceeding had terminated, "the order to produce was not directed to the defendants," and "[t]he government's right in such a situation is not before us." This court, however, in *In re Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894 (7th Cir. 1973), decided on its merits a challenge to a disclosure order by witnesses before the grand jury who sought to prevent disclosure of their testimony for use in proceedings against them before a board of inquiry of the Chicago Police Department. The policemen were of course not only parties to the board proceeding but, unlike intervenors here, were themselves witnesses before the grand jury.[4] Yet, if the Third Circuit's reasoning had been applied, they would have lacked standing. Similarly, in *In re Holovachka*, 317 F.2d 834 (7th Cir. 1963), a witness before the grand jury was given leave to intervene in the district court for purposes of opposing disclosure of his testimony and was heard in this court. While the standing issue appears not to have been raised in either *Special February 1971 Grand Jury* or *Holovachka* and was not mentioned in either opinion, there would have been no case before the court in the absence of standing, so the failure to dismiss either appeal is not without significance. Nevertheless, it is appropriate to state our reasons for differing with the Third Circuit.

Under Rule 6(e), Fed. R. Crim. P., disclosure of occurrences before the grand jury by attorneys and other described persons may be made "only when so directed by the Court." Although the rule does not say so specifically,

[4] Rule 16(a)(1)(A), however, treats grand jury testimony by certain corporate employees as though the corporation itself had been the witness.



the reference must be to the court of the district in which the grand jury was convened.[5] See *Gibson* v. *United States*, 403 F.2d 166, 167 (D.C. Cir. 1968). It is that court that has the responsibility for enforcing Rule 6(e) and maintaining the secrecy of the grand jury proceedings.

Rule 6(e) also omits to state whether any one is entitled to object to disclosure. As respondent Sarbaugh points out, however, the rule seems to contemplate a proceeding of some kind, judicial proceedings are not normally *ex parte*, and persons in the situation of the intervenors are likely to be the only ones to object to an order for disclosure. If they are not allowed to appear, the advantages of an adversary proceeding are lost.

Applying the standards governing intervention in civil cases, the intervenors have an interest sufficient to satisfy the requirement of standing and to entitle them to intervene. See Rule 24(a)(2), Fed. R. Civ. P. It is true, as the state points out, that the reasons underlying the policy of secrecy do not include protection of indicted persons. See *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 681-682 no.6 (1958); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (majority), 405 (Brennan, J.,

[5] We do not imply disapproval of the procedure adopted by the District Court in this case of transferring the transcripts to the District in which the trial was to be held, so that court can make determinations of particiularized need during trial, which the transferor court is not in a position to do. In a case in which the secrecy of the transcripts had not already been partially breached, see Part III, *infra*, and there is a likelihood that a particularized need will arise during trial, that procedure would be eminently sensible and, we believe, within the power of the court in which the grand jury is convened. *Cf. Baker* v. *United States Steel Corp.*, 492 F.2d 1074, 1076-1077, 1078 (2d Cir. 1974); *Gibson* v. *United States*, 403 F.2d 166, 167-168 (D.C. Cir. 1968).

dissenting) (1959); *In re Special February 1971 Grand Jury* v. *Conlisk, supra,* 490 F.2d at 895-896. Indicted persons now defending a civil action involving the same facts are, however, among those who would be adversely affected by disclosure of the information, and therefore should have a right to be heard.

Finally, at least if the civil case is pending before the court of the district in which the grand jury was convened,[6] essentially the same issue of whether the transcripts which were made available to defendants in the criminal case are subject to discovery for use in the civil case can alternatively be presented in the civil case itself, as it was, for example, in *Proctor & Gamble, supra.* See also *State of Texas* v. *United States Steel Corp.,* No. 76-2781 (5th Cir. Feb. 3, 1977), Slip Op. at 1333. The right of the defendants in the criminal case to be heard on the issue of disclosure should be the same in either proceeding.

The motion to strike intervenors' appearances as appellees is accordingly denied.

II. *Appealability*

As we have noted, Rule 6(e), Fed. R. Crim. P., vests jurisdiction to release the grand jury transcripts in the United States District Court for the Eastern District of Illinois. The instant petition was filed there as an independent proceeding after the discharge of the grand jury and the termination of the criminal action initiated

[6] See text at note 5, *supra.* Plaintiff at bar asked the court in the civil case to order the defendants to produce copies but that court declined to act on the ground that it lacked jurisdiction. See the summary of the proceedings below, *supra.*



by the indictment. This subsequent independent proceeding was terminated by the District Court's order denying the petition, which "disposes of the contentions of all the parties, leaving nothing else to be decided," "ends the controversy before" the District Court, and is therefore appealable under 28 U.S.C. § 1291. *United States* v. *Byoir,* 147 F.2d 336, 337 (5th Cir. 1945); *Gibson* v. *United States, supra,* 403 F.2d at 167. Compare, *United States ex rel. Hi-Way Electric Co.* v. *The Home Indemnity Co.,* No. 76-1242 (7th Cir. Feb. 11, 1977), Slip Op. at 5. An order refusing disclosure (as in *Gibson*) was distinguished for purposes of appealability from one that grants disclosure (as in *Byoir*) in dictum in *Baker* v. *United States Steel Corp.,* 492 F.2d 1074, 1078 (2d Cir. 1974). In that case the court held unappealable both an order of disclosure by the court to which grand jury transcripts had been transferred and the transferor court's order of transfer. Compare, however, Judge Lumbard's dissent in that case and *In re Biaggi,* 478 F.2d 489 (2d Cir. 1973).[7]

Our conclusion that the order is final is not altered by the transfer of the documents to the Southern District of Illinois for possible future disclosure in the proceeding pending there. That a court of another jurisdiction in another case may ultimately grant part of the relief denied by the order on the basis of a particularized need appearing later does not render interlocutory an order effectively terminating the proceeding in the Eastern District. We therefore deny the motions to dismiss the appeal.

[7] Our case is distinguishable from *Baker* on its facts, and the majority there did imply that an order denying discovery may be appealable even though one granting it is not. Nevertheless, the rationale of the majority does not appear to be in harmony with the view we have adopted.

III. *The Merits*

Disclosure authority is granted the court in broad terms in Rule 6(e): disclosure outside the criminal proceeding may be made "preliminarily to or in connection with a judicial proceeding." The Supreme Court has declared that the secrecy protected by Rule 6(e) "must not be broken except where there is a compelling necessity," which "must be shown with particularity." *United States* v. *Proctor & Gamble Co., supra,* 356 U.S. at 682; *Pittsburgh Plate Glass Co.* v. *United States, supra,* 360 U.S. at 399-400. This standard may have "been eroded to some extent," *Baker* v. *United States Steel Corp., supra,* 492 F.2d at 1080 (Lumbard, J., dissenting), by language in *Dennis* v. *United States,* 384 U.S. 855, 869-871 (1966), if not by decisions of lower federal courts led by *U.S. Industries, Inc.* v. *United States District Court,* 345 F.2d 18, 21 (9th Cir.), *cert. denied,* 382 U.S. 814 (1965), which held that when the reasons for the policy of secrecy "do not apply at all in a given situation, or apply to only an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need."[8] Accord, *In re Cement-Concrete Block, Chicago Area, Grand Jury Proceedings,* 381 F.Supp. 1108 (N.D. Ill. 1974); *State of*

[8] In *U.S. Industries* the Ninth Circuit permitted discovery in a civil antitrust action of a presentence memorandum containing "information within the purview of the grand jury secrecy provision of Rule 6(e) . . . ." The court found that only one of the policies behind grand jury secrecy was applicable, "that of insuring untrammeled disclosure by *future* grand jury witnesses." (Emphasis in original.) Inasmuch as the witnesses' employers had already inspected the government report, however, the court found that minor redactions in the document could avoid any adverse impact on future grand jury witnesses. The court then permitted discovery of the document, because of its view that it would be "highly inequitable and averse to the principles of federal discovery to allow one party access to a government document and not the other." *Id.,* 345 F.2d at 23.



*Connecticut* v. *General Motors Corp.,* 1974-2 Trade Cases ¶ 75, 138 (N.D. Ill. 1974); *In re Arizona Dairy Products Litigation,* 1976-1 Trade Cases ¶ 60,910 (D. Ariz. 1975). Compare also *In re Special February 1971 Grand Jury* v. *Conlisk, supra,* 490 F.2d 894, with *In re Holovachka, supra,* 317 F.2d 834. However this may be, there still exists in civil cases and cases in which disclosure is not provided for as a matter of right in 18 U.S.C. § 3500(e)(3) and Rule 16(a)(1)(A), Fed. R. Crim. P., a requirement that the party seeking disclosure show a need commensurate with the degree of secrecy remaining and the policy reason that justifies protecting that secrecy. The state concedes as much in the case before us.

The level of need has been said to diminish as the reason for preserving secrecy becomes less compelling. *U. S. Industries, Inc.* v. *United States District Court, supra,* 345 F.2d at 21; see also *State of Illinois* v. *Harper & Row Publishers, Inc.,* 50 F.R.D. 37, 41 (N.D. Ill. 1969). When a grand jury has completed it work and the criminal proceedings initiated by its indictment have been concluded, several of the reasons for secrecy, see *United States* v. *Proctor & Gamble Co., supra,* 356 U.S. at 681 n.6, no longer remain.[9] The reason that survives the grand jury's term and the criminal proceeding is the need to protect the grand jury witnesses from retaliation, lest witnesses before future grand juries be inhibited by the knowledge "that the secrecy of their testimony [may] be lifted tomorrow." *United States* v. *Proctor & Gamble Co., supra,* 356 U.S. at 682. That is what we are concerned with here.

[9] In *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 234 (1940), the Court said that "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." While this statement may appear to have been limited by *Proctor & Gamble* and *Pittsburgh Plate Glass,* it was quoted with approval in *Dennis,* 384 U.S. at 870.

In an antitrust context, the force of this reason is considerably diminished by the disclosure pursuant to Rule 16(a)(1)(A) to the witness' corporate employer, who has greater incentive and power to retaliate than anyone else. Once the employer has the transcript, all that remains of the reason for secrecy is the need to protect the witness, to the extent it is still possible to do so, from potential adverse effects on his future relationships with members of the industry other than his employer. This residual need cannot be dismissed as unworthy of any consideration, *cf. Pittsburgh Plate Glass Co.* v. *United States, supra,* 360 U.S. at 400, but it can be adequately dealt with by a protective order.

One additional factor will sometimes narrow the remaining zone of secrecy and further dilute what remains of the reason for secrecy. As illustrated in this case by the disclosure of transcripts by at least one of the intervenors to a co-defendant, the need of joint defendants to cooperate in their common defense will often lead to further disclosures within the group of defendants in the criminal case and sometimes to those who may be added in the civil case. Such further disclosure may, of course, be restricted by court order[10] or, as in *State of Texas* v. *United States Steel Corp., supra,* No. 76-2781, Slip Op. at 1334, by voluntary agreement among the defendants not to share the transcripts. When transcripts are shared, however, the group of potential retaliators who do not

[10] We recognize that Rule 6(e) includes the provision, "No obligation of secrecy may be imposed upon any person except in accordance with this rule." The rule also provides, however, that the court may permit disclosure "preliminarily to or in connection with a judicial proceeding," an authority which, we believe, includes the power to prohibit one receiving disclosure pursuant to that authority from making any further disclosure that is not required in connection with that judicial proceeding.



know of the grand jury testimony is reduced and so is the importance of maintaining secrecy.

We are not persuaded, however, by the state's argument, supported by *State of Connecticut* v. *General Motors Corp., supra,* 174-2 Trade Cases ¶ 75,138, that all secrecy was lost in the case at bar as a result of the unconditioned orders for disclosure to the intervenors when they were defendants in the criminal case. Even though those corporations were not restrained by the terms of the orders from disclosing the transcripts indiscriminately, they received disclosure in the exercise of their rights under Rule 16(a)(1)(A) and for use in preparing the defense of the criminal case. Given this and the unlikelihood that the corporations would make further disclosures not related to the defense of litigation, we think there remained a residual secrecy deserving of some protection.

Having considered what remains of the reason for secrecy in the case at bar, we turn to the level of particularized need that must be shown to warrant disclosure. Usually, if not invariably, a need for disclosure arises from a litigant's interest in seuring accurate and truthful testimony from witnesses. *E.g., Dennis* v. *United States, supra,* 384 U.S. at 872-873. Courts have generally recognized, as the District Court did in the case at bar, that the trial testimony of a witness may give rise to a particularized need for a grand jury transcript of his testimony for use in impeaching him or refreshing his recollection.[11]

[11] Whatever *Dennis* left of the requirement that a defendant in a federal criminal case show a particularized need to obtain the transcript of a prosecution witness' grand jury testimony, see 384 U.S. at 871-874, was swept away by the amendment of 18 U.S.C. § 3500(e), part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 926 (1970).

*United States* v. *Proctor & Gamble Co., supra,* 356 U.S. at 683. Deposition testimony may also give rise to such a need. *Atlantic City Electric Co.* v. *A. B. Chance Co.,* 313 F.2d 431 (2d Cir. 1963), cited with approval in *Dennis,* 384 U.S. at 870 n.15; *State of Illinois* v. *Harper & Row Publishers, Inc., supra,* 50 F.R.D. at 40-42. If a witness is required to testify publicly about matters previously dealt with in his grand jury testimony, there is little to be said for not allowing the use of his earlier testimony to assure the accuracy of his later testimony. See *Baker* v. *United States Steel Co., supra,* 492 F.2d at 1079.

The unfairness of permitting one side "to have exclusive access to a storehouse of relevant fact" was another factor bearing on need which was given explicit recognition in *Dennis,* 384 U.S. at 873. See also *U.S. Industries, Inc.* v. *United States District Court, supra,* 345 F.2d at 23; *In re Cement-Concrete Block, Chicago Area, supra,* 381 F.Supp. at 1111. While *Proctor & Gamble* and *Pittsburgh Plate Glass* teach us this factor is not decisive, it is to be weighed with the degree of secrecy remaining and the possibility of guarding by protective order the interests that secrecy serves to protect.[12]

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[12] Another factor enhancing the particularized need in the case at bar, although we believe a sufficient showing has been made without it, is the lapse of time between the events in issue and the testimony the witnesses will give in depositions or trial. *Cf. Dennis* v. *United States, supra,* 384 U.S. at 872. The grand jury testimony was given during 1972. While some of the delays in pretrial proceedings in the civil case are chargeable to the plaintiff, it understandably would wish to postpone taking the deposition of a witness until it had exhausted the possibility of obtaining his grand jury transcript for use in connection with the deposition. The degree of plaintiff's responsibility for delay is not comparable to that in *Baker* v. *United States Steel Corp., supra,* 492 F.2d at 1079.



The remaining question is whether, in order to establish particularized need, it must also be shown that the witness' trial or deposition testimony is inconsistent with his grand jury testimony or that his memory has faltered or failed with respect to a matter he was able to recall before the grand jury. If this is necessary, need cannot be shown without the intervention of a judge to read and compare, *in camera,* the earlier and later testimony. This has been the traditional practice for both trial, see *Dennis* v. *United States, supra,* 384 U.S. at 874, and deposition, see *Atlantic City Electric, supra,* and *Harper & Row,*[13] *supra,* testimony and is the procedure for which the government argued in *Dennis.* The Supreme Court, however, found it inadequate in the following words:

> "Trial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony. In any event, 'it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness.' *Pittsburgh Plate Glass,* 360 U.S., at 410 (dissenting opinion). Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." 384 U.S. at 874-875.

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[13] In *Harper & Row* the trial judge, having found discrepancies and memory failures with respect to the depositions of a number of witnesses from his *in camera* inspection of their grand jury testimony, ordered transcripts of other witnesses' grand jury transcripts disclosed to the plaintiffs. *Id.,* 50 F.R.D. at 42.

Although *Dennis* was a criminal case, the quoted passage seems equally applicable to civil cases. Moreover, when the *in camera* procedure is invoked for deposition testimony, an intolerable burden is often placed on district judges, *cf. State of Illinois* v. *Harper & Row Publishers, Inc., supra,* 50 F.R.D. at 40-42.

Given the residual reason for secrecy in a case such as this, we believe that a particularized need for the limited disclosure we prescribe below is sufficiently shown if the corporate employer of the grand jury witness whose transcript is sought has obtained a copy of that transcript, and the witness is scheduled to be called to give testimony either at trial or by deposition on the matters about which he testified before the grand jury.

The restrictions upon the disclosure which we adopt to protect the remaining limited interest in secrecy are suggested by Judge Robson's opinion in *Cement-Concrete Block, supra,* 381 F.Supp. at 1110:

> "[T]his danger may be obviated by limiting the disclosure to the attorneys of record [in the treble-damage case] for use in that litigation only for the purposes of impeachment, refreshing the witness' recollection and testing credibility."

To aid in enforcing this condition, the District Court should release the transcripts to a single attorney for plaintiff and require him to keep and ultimately file with the court a log showing to whom and when each transcript or portion thereof has been shown. To these restrictions should be added a prohibition against copying and a requirement that the transcripts be returned when they are no longer needed for the prescribed use. See *State of Illinois* v. *Harper & Row Publishers, Inc., supra,* 50 F.R.D. at 40. Compare *Manual for Complex Litigation*, Part II, Appendix 2.20 (amended 1975). In addition, if a defendant contends that a portion of any transcript has no bearing on any issue in the private antitrust action, that contention may be presented to the District Court in a motion to withhold that portion from disclosure.



Two recent cases in other circuits dealing with the private antitrust plaintiff's right to grand jury transcripts deserve mention. The Second Circuit, in *Baker* v. *United States Steel Corp., supra,* 492 F.2d at 1076 n.2, 1079 (majority), 1080-1081 (Lumbard, J., dissenting), has said that grand jury secrecy should not be breached for general discovery purposes. Yet the court recognized that disclosure is appropriate

> "to enable counsel to perform the vital function of cross-examining a witness who is obligated for other reasons to testify publicly with respect to the same matters which were the subject of his grand jury testimony"

492 F.2d at 1079, citing, among other authorities, *State of Illinois* v. *Harper & Row Publishers, Inc., supra,* 50 F.R.D. at 37. Our decision is consistent with the limitation and the quoted language.

The other case, *State of Texas* v. *United States Steel Corp., supra,* No. 76-2781, Slip Op. at 1333, was decided after oral argument of the case before us. There the Fifth Circuit denied the State of Texas, as plaintiff in a treble-damage antitrust action, unlimited access to copies of transcripts from a related grand jury investigation which were in the possession of the defendants themselves.[14] The court's conclusion appears to rest on an analogy between

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[14] The Fifth Circuit attached no significance to the fact that the materials were sought from the defendants in the civil case rather than the prosecutor in the criminal case. Nor do we. See notes 5 and 6, *supra.* We note, however, that in view of the continuing public interest in maintaining the effective functioning of future grand juries, the Attorney General, as the officer charged with protecting that interest, will be entitled to oppose disclosure and therefore should receive notice of motions for disclosure in civil cases to which the government is not a party.

the situation in which "the witness obtains his own transcript," and, that in which the corporation receives the transcript of its spokesman. The fear-of-retaliation reason for preserving secrecy, said the court, "remains unaffected" in the first situation, a point which the state conceded; and the rule should be the same in the second. We are not sure the reason for secrecy does remain unaffected when the individual witness is sued or sues in a civil case, but, assuming that it does, we question the analogy. As we have noted, when a corporation receives disclosure of its employee's grand jury testimony, disclosure has been made to the most likely source of retaliation. Surely this affects the need for secrecy and, we believe, allows what remains of that need to be satisfied by conditions in the disclosure order. The Fifth Circuit did recognize that the state might well have some inspection rights but required it to "draw a finer bead," so the disparity in the results that would be reached by that court and ours may not be as great as it appears at first.

We therefore reverse the order of the District Court and remand the case for further proceedings consistent with this opinion.[15] The District Court for the Southern District of Illinois should return the transcripts to the District Court for the Eastern District of Illinois, upon the latter's request, to permit compliance with the mandate of this court.

REVERSED and REMANDED.

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A true Copy: *Clerk of the United States Court of*
Aeste: *Appeals for the Seventh Circuit*

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[15] In view of the inconsistency between our views on the issues on intervention and appealability and on the merits and those expressed in certain opinions of other circuits, this opinion has been circulated among all judges of this court in regular active service. Judge Wood disqualified himself from any consideration of this case. No judge favored a rehearing in banc on any issue.



UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
April 28, 1977
Before
Hon. PHILIP W. TONE, *Circuit Judge*

STATE OF ILLINOIS,

Petitioner-Appellant,

No. 76-1690 vs.

JOHN E. SARBAUGH, Chief, Midwest Office, Antitrust Division of the United States Department of Justice,

Respondent-Appellee,

J. L. SIMMONS COMPANY, INC., and LEE H. SENTMAN, JR.,

Intervenors-Appellees.

Appeal from the United States District Court
for the Eastern District of Illinois,
Danville Division
No. CR-72-67-D

On April 26, 1977 this Court entered an order granting a stay of mandate ". . . pending the filing of a timely application to the Supreme Court of the United States for a writ of certiorari." Also on April 26, 1977, counsel for the petitioner-appellant filed herein its "MOTION IN OPPOSITION TO MOTION TO STAY MANDATE." On consideration whereof, this Court being fully advised in the premises,

IT IS ORDERED that this Court's previous order of April 26, 1977 be MODIFIED to the extent that the intervenors-appellees' motion for stay of mandate be granted only for a period of thirty days, nunc pro tunc as of April 26, 1977, pursuant to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ILLINOIS

STATE OF ILLINOIS,

*Petitioner,*

*vs.*

JOHN E. SARBAUGH, Chief, Midwest Office, Antitrust Division of the United States Department of Justice,

*Respondent.*

In Re Grand Jury Proceedings

(CR-72-67-D)

### MEMORANDUM OPINION

Petitioner, the STATE OF ILLINOIS, is pursuing a civil treble damage antitrust action on the heels of a Justice Department criminal investigation of the highway construction industry in Illinois. In that context, for use in the civil litigation, petitioner seeks the production of materials currently in the possession of the Antitrust Division, including grand jury transcripts of the investigation, documents, copies of subpoenas and the names of witnesses who appeared before the grand jury. This case speaks to the propriety of an incursion into the traditionally secret realm of grand jury proceedings. The issue of pretrial access to such materials is one of first impression for this Court.

On December 19, 1972, a federal grand jury empaneled in this District returned a one count indictment naming as defendants nine companies and four individuals. The indictment charged the defendants with certain violations of the Sherman Act, 15 U.S.C. § 1, in connection with the

construction of Interstate 74 in Illinois. The defendants, it seems, had collusively allocated certain projects let by the State of Illinois among themselves in such a manner as to render the bidding noncompetitive.

All of the criminal defendants named in the indictment entered pleas of *nolo contendere* and fines were imposed. *United States* v. *Champaign Asphalt Co., et al.*, CR 72-67-D (E.D. Ill.). The grand jury was discharged and all criminal proceedings arising therefrom have been completed.

On November 7, 1973, however, the State of Illinois had filed its treble damage suit in the Southern District of Illinois. There is the expected similarity between parties defendant; although the civil suit names five companies not indicted in this District. *State of Illinois* v. *Champaign Asphalt Co., et al.*, S-CIV-73-216 (S.D. Ill.). To facilitate discovery and presumably for later use in the trial, the State presented a petition for production of the grand jury materials before Judge Harlington Wood of the Southern District, where the civil suit is pending. Judge Wood denied the State's request on the ground that it should have been brought in this District, as the materials sought were in connection with a grand jury impaneled here.

The matter is now before this Court. The petitions are general in form, seeking production for inspection and copying of items identified exclusively by their membership in the following descriptive categories: (1) All documents produced pursuant to grand jury subpoenas; (2) All documents voluntarily submitted to the Antitrust Division; (3) Grand jury subpoenas issued; (4) The names of all witnesses who appeared before the grand jury, and; (5) Grand jury transcripts which were *released* and *made available* to various persons, *viz:* defendants in the civil



or criminal action, witnesses before the grand jury, or any third person not an attorney for the U.S. Department of Justice. By its terms the petitions limit the demand to materials relevant to the criminal action in *United States* v. *Champaign Asphalt Co., et al., supra.*

Based upon representations by the Antitrust Division, what we are talking about here is approximately thirty-eight thousand pages of documents received from twenty-two owners, either voluntarily or pursuant to grand jury subpoenas. In addition, seventeen subpoenas *duces tecum* and forty-nine *ad testificandum* subpoenas were issued during the grand jury investigation. The extent of the volumes of transcripts has not been brought to the attention of the Court.

The Court has not assumed the burdensome task of reviewing the documents or the transcripts *in camera.* It is not the task of this Court to determine the relevancy of the material or to evaluate its potential usefulness in discovery or trial. In considering the necessity of an *in camera* review, the Supreme Court held in *Dennis* v. *United States,* 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966):

> ". . . Trial judges ought not to be burdened with the task or the responsibility of examining sometimes voluminous grand jury testimony. . . . Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge" (at 874, 5).

Justice Fortas, speaking for the Court, reasoned that a trial judge's function in this regard is limited to deciding whether a case has been made for production, and to supervise the process.

An opportunity was provided for all corporate and individual defendants, in the instant case, to file responses and memoranda. One individual and two corporate defendants have come forth asserting grand jury secrecy as a bar to disclosure to one extent or another. The Government has filed a response interposing no substantial objection.

Any disclosure of "matters occurring before the grand jury" must conform to the general authorization contained in Rule 6(e) of the Federal Rules of Criminal Procedure. The Rule, while by its language provides for certain limited circumstances wherein the grand jury's veil of secrecy may be pierced; it is, in effect, a general deference to the discretion of the trial judge. It will be our task to determine which of the requested materials is sheltered by the Rule's penumbra and then to explore questions such as the propriety, timeliness, and manner of disclosure in the instant case. See *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 399, 79 S.Ct. 1237, 3 L.Ed.2d 1323 (1959). Rule 6(e) reads in part:

> "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise . . . *only when so directed by the court preliminarily to or in connection with a judicial proceeding* . . . No obligation of secrecy may be imposed upon any person except in accordance with this rule. . . ." (emphasis supplied)

The first sentence of Rule 6(e) refers to attorneys for the United States Government. It must not be read as an entrée for 'government attorneys' of the State of Illinois.



*In re Holovachka,* 317 F.2d 834, 836 (7th Cir. 1963), Rule 54(c) Federal Rules of Criminal Procedure.

While Rule 6(e) provides an authorization for the disclosure of matters occurring before the grand jury, it must be read in light of the long line of cases in which the Supreme Court has affirmed the "long established policy that maintains the secrecy of the grand jury proceedings in the federal courts," *United States* v. *Procter & Gamble Co.,* 356 U.S. 677, 681 (1958). See *e.g. Pittsburgh Plate Glass Co., supra, Dennis* v. *United States,* 384 U.S. 855 (1966), *Smith* v. *United States,* 423 U.S. 1303 (1975).

Such a shroud of secrecy is essential to the functioning of the grand jury as a discrete and independent authority.

"While the grand jury is, in a sense, a part of our court system, when exercising its traditional functions, it possesses an independence which is unique. Its authority is derived from none of the three basic divisions of our government, but rather directly from the people themselves." *In re April 1956 Term Grand Jury,* 239 F.2d 263 (7th Cir. 1956) Hence the court's discretion has its limits and boundaries. Disclosure may be appropriate in the given case, but it will enter only through a narrow opening created by judicial interpretation of Rule 6(e). Simply stated, the petitioner must establish a compelling need, shown with particularity. It is well to note that the development of a body of law favoring disclosures has not yet superseded the rule of secrecy.

The Court will discuss each of the requested materials *seriatim.*

### The Documents

In the usual course of events, where the grand jury proceedings have terminated and the entire criminal aspect of the case is complete and resolved, the Antitrust

Division is bound to return the documents it has obtained to the true owners thereof. Due to the intervention of this petition such action on the part of the Government has been forestalled, awaiting the decision of the Court. Although it appears that some of the documents have already been returned, but for the fact, then, that the great bulk of the documents, belonging to the criminal defendants are still in the possession of the Antitrust Division, they would be subject to normal discovery. Petitioner alleges this disability in paragraph number five, Petition for Production of Documents. Notwithstanding, petitioner hopes to take advantage of the fact that a significant quantity of useful material has been assembled under the auspices of the grand jury, and is being stored in a single, convenient location. Petitioner's paragraph six alleges: "[a] single inspection and copying of the herein described documents by petitioner will contribute to the efficient administration and simplification of pre-trial discovery and will result in substantial economy of time and money to the Court and to the parties." Petitioner also asserts that the documents are sought for their own sake rather than to learn what occurred before the grand jury.

There are obvious economic advantages in the wholesale delivery of documents assembled by a grand jury for the civil litigant. However, one of the reasons for the rule of grand jury secrecy is to prevent the grand jury "from being used as an instrument for explorations in aid of civil proceedings." *In re April 1956 Term Grand Jury,* 239 F.2d 263, 271 (7th Cir. 1956). However persuasive are the arguments of economy, mere avoidance of monetary burden will not suffice to bring the Court's discretion into play under Rule 6(e), Federal Rules of Criminal Procedure. *United States* v. *Procter & Gamble Co.,* 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958), *Corona*



*Construction Co.* v. *Ampress Brick Co., Inc.,* 376 F. Supp. 598 (N.D. Ill. 1974), *Smith* v. *United States, supra.*

It is settled law that where a document sought in discovery proceedings is sought for itself, independently, rather than because it was displayed to a grand jury, there is no bar of secrecy. *Commonwealth Edison Company* v. *Allis-Chalmers Manufacturing Company,* 211 F. Supp. 729 (N.D. Ill. 1962), *In re Hearings Before the Committee, Etc.,* 19 F.R.D. 410 (N.D. Ill. 1956). Petitioner cites *United States* v. *Interstate Dress Carriers, Inc.,* 280 F.2d 52 (2d Cir. 1960), as controlling authority. Therein the Court affirmed an order permitting inspection of documents in the custody of the Justice Department pursuant to grand jury subpoena:

> ". . . it is not the purpose of the Rule [6(e)] to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury. Thus, when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury. . . ."
>
> "[Petitioners] do not seek to learn what use the grand jury has made of appellants' records. They wish only to inspect and copy the records, which happen to be in the control of the grand jury, for their own lawfully authorized investigation." (at 54)

The Court's concern in *Interstate,* as with all of the cases in which the direct disclosure has been authorized, was that the civil litigant was not to be hamstrung in the development of its case by placing certain material out of its reach. Association with a grand jury proceeding

then, cannot work a taint on discoverable matters. In a different situation, however, where for some reason the documents cannot be returned to the owners and would be therefore otherwise unavailable, it may, upon the proper showing, be appropriate to allow a direct disclosure of documents, where sought with specificity. *Davis* v. *Romney,* 55 F.R.D. 337 (E.D. Pa. 1972).

Here petitioners have issued a blanket request which encompasses virtually the entire investigatory file of the Antitrust Division, including documents collected pursuant to grand jury subpoenas and documents submitted voluntarily, some of which were and some of which were not presented to the grand jury. This goes beyond the mere seeking of documents for their own sake. "The idea that information obtained from the perusal of material in the possession of a grand jury may be used for the purpose of a civil proceeding is in direct conflict with the policy of secrecy of grand jury proceedings." *In re April 1956 Term Grand Jury, supra,* at 271. *Corona Construction Co.* v. *Ampress Brick Co., Inc., supra.* The danger associated with a direct, wholesale disclosure, such as petitioners request, is that the nature and extent of the documents assembled, by their association with the proceedings, might reveal the focus of the inquiry, the identity of witnesses (discussed below) or other protected matters. This danger can be avoided in the instant case. The Court feels that to release the documents to their respective owners, freeing them for normal discovery, where possible, is the most satisfactory method of safeguarding both the sanctity of the grand jury and insuring the ordered availability of discoverable matters.

Petitioner places much reliance on the recent case of *In re Cement-Concrete Block, Chicago Area,* 71 GJ 8001 (N.D. Ill. 1974) (petition for production of documents and



grand jury subpoenas); 381 F. Supp. 1108 (N.D. Ill. 1974) (petition for production of grand jury transcripts). The case is remarkably on all fours with the case at hand. Indeed, lest we proceed with caution, similar petitions will be encouraged to sprout replacing the 'old fashioned' federal rules of discovery with a streamlined version of expedient looting of the grand jury vaults. Admittedly there has been some relaxation of the traditional rules of secrecy; the *Concrete Block* decision would allow an unprecedented use of the grand jury.

The plaintiffs in *Concrete Block,* the State of Illinois among them, had earlier petitioned the Court as plaintiffs in *Corona Construction Co.* v. *Ampress Brick Co.,* 376 F. Supp. 598 (N.D. Ill. 1974). Judge Bauer there issued a strongly worded opinion in which he held against the petitioners:

> "it is clear to this Court that the policy of . . . secrecy established by this Court should not be circumvented by means of obtaining a Court order requiring the Antitrust Division to produce and disclose the material requested. . . ." (at 602).

Judge Bauer held, however, that in accord with local criminal rules only the Chief Judge had the authority to disclose matters occurring before the grand jury; and so, properly deferred.

In two separate opinions, one published and the other unpublished, the Chief Judge issued sweeping orders allowing disclosures of documents and subpoenas issued by the grand jury; and disclosure of grand jury transcripts for use in the civil litigation. As regards the documents and subpoenas, the Court found arguments for utility and economy to outweigh any argument for

grand jury secrecy. This Court declines to follow that path.

The respondent, Chief of the Midwest Office, Antitrust Division, is therefore ordered to return all documents in his possession pertaining to the grand jury investigation in *United States of America* v. *Champaign Asphalt Co., et al., supra,* to counsel for the respective owners so that they may be available for discovery by the State.

TRANSCRIPTS

Petitioner proceeds on a theory of 'fair play', contending that it is repugnant to the principles of federal discovery to allow disclosure of prior statements to one party and deny access to the other party on the "specious grounds" that the 'secrecy' of grand jury testimony already disclosed would be violated. Petitioner seeks disclosure of those grand jury transcripts which were *released* and made *available* to various persons.

The great bulk of the disclosure which has occurred was made pursuant to this Court's order of January 22, 1973. The Antitrust Division disclosed to each of the several defendants who so requested, the grand jury testimony of its own present or former corporate personnel, who were so situated at the time of the unlawful acts, or at the time of the grand jury proceedings, that they could legally bind such corporation with matters that were the subject of the criminal indictment. The government represents that several disclosures were made by the United States Attorney's office, pursuant to the court order, however, no records exist which accurately reflect the extent of this disclosure. For the purposes of the instant case we will have to assume that disclosure has been made to each eligible defendant.



The only other persons who had access to the transcripts other than those mentioned and attorneys for the United States Department of Justice (and supportive staff), were persons shown transcripts, in whole or in part, in connection with the trial preparation of seven subsequent criminal cases filed on January 17, 1974, in the Southern District of Illinois. (Respondent, the Antitrust Division, alleges these latter transcripts to be immaterial to *State of Illinois* v. *Champaign Asphalt Co., supra.,* thereby outside the scope of petitioner's request.)

While grand jury testimony is ordinarily confidential, after the grand jury's functions are ended, limited disclosure is wholly proper where the ends of justice require it. *United States* v. *Sacony Vacuum Oil Co.,* 310 U.S. 150, 233, 60 S.Ct. 811, 849 (1940). However, the indispensable secrecy of grand jury proceedings "must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity." *United States* v. *Procter & Gamble,* 356 U.S. 677, 682 (1957). The Supreme Court recognized in *Procter & Gamble* that impeaching a witness, refreshing his recollection and testing his credibility were all instances of particularized need.

The policy reasons favoring grand jury secrecy, which are universally cited with approval (see *Procter & Gamble* at 681, n.6) were first enumerated by Judge Coleman in *United States* v. *Amazon Industrial Chemical Corp.,* 55 F.2d 254, 261 (D. Md. 1931):

> ". . . (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations,

and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

None of the reasons traditionally advanced to justify nondisclosure are significant here, with the possible exception of number four, above. This policy consideration survives the conclusion of grand jury proceedings in any one investigation and goes to the protection of the functioning of the grand jury system as a whole. If witnesses know that what they reveal today will be part of the public record tomorrow, they may be reluctant to come forth with the complete candor that is essential to a thorough inquiry. They may fear intimidation and reprisals by those against whom their testimony is directed. In the instant case, however, this policy consideration loses much of its significance since the transcripts which are sought, the testimony of corporate employees, have presumably been released to the defendant employers, who are the likely source of any reprisals. The possibility of retaliation from other sources can be reduced to a minimum by limiting disclosure to the attorneys of record in *State of Illinois* v. *Champaign Asphalt Co., et al., supra,* for use in that litigation only for the purposes of impeachment, refreshing the witnesses' recollection and challenging credibility. This is the conclusion which was properly



reached in the published opinion of *In re Cement-Concrete Block, Chicago Area,* 381 F. Supp. 1108 (N.D. Ill. 1974).

None of this is to say, however, that where the reasons for secrecy are minimal the civil litigant has a *right* to the disclosure of grand jury minutes. Such a practice would detract from the efficacy of the grand jury proceedings:

> "Grand jurors would not act with that independence required of an accusatory and inquisitorial body. Moreover, not only would the participation of the jurors be curtailed, but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused. Especially is this true in antitrust proceedings where fear of business reprisal might haunt both the grand juror and the witness. And this 'go slow' sign would continue as realistically at the time of trial as theretofore." *Pittsburgh Plate Glass Co.* v. *United States, supra,* at 400.

The Supreme Court held in *Pittsburgh Plate Glass* that the burden is always on the petitioner to show that a "particularized need" exists for the transcripts which outweighs the policy of secrecy. This same balancing test was announced in *Dennis* v. *United States,* 384 U.S. 855, 871 (1965), and followed in *Allen* v. *United States,* 390 F.2d 476 (D.C. Cir. 1968), and *U. S. Industries Inc.* v. *United States District Court,* 345 F.2d 18, 21 (9th Cir. 1965), *inter alia:*

> ". . . a violation of grand jury secrecy should only be permitted upon a showing of 'particularized and compelling need'. But we cannot treat this test *in vacuo.* We must take recognition first of the fact that

whether such a 'need' exists is a matter designedly left initially to the discretion of the trial judge. . . . Secondly, it must be kept in mind that, in making a determination of when to permit a disclosure . . . we are to examine not only the need of the party seeking disclosure, but also the policy considerations for . . . secrecy as they apply to the request. . . . In other words, if the reasons for maintaining secrecy do not apply at all in a given situation, or apply to only an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need."

In cases involving the access of a *criminal* defendant to critical information possessed by the government, the "need" of the petitioner becomes more relevant. "These developments are entire consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Dennis* v. *United States, supra* at 870. The D. C. Circuit in *Allen* v. *United States, supra,* has interpreted the *Dennis* decision, in the criminal context, as actually reversing the burden of establishing compelling need to the respondent:

> "The narrower question in *Dennis* and in the case at bar, however, is whether the 'clearest and most compelling considerations' dictate that the grand jury testimony of a trial witness, . . . be kept from the defendant." (at 480).

The fact that disclosure of grand jury testimony is sought in a private civil action rather than in a criminal proceeding is no bar to the power of the Court to grant an application for disclosure; but it does mean that the petitioner will have to independently establish a "compelling necessity" shown with "particularity." It would be erroneous to rely here on the liberal language of cases which have dealt with the problem in a criminal context.



The petition, in the case at bar, by its terms, would fall far short of establishing both particularity and the lighter standard of compelling need required in a civil action where the reasons for secrecy are *de minimis.* Paragraph seven of the petition states:

> "(7). A single inspection and copying of these transcripts by Petitioner will contribute to an even-handed and efficient administration of pretrial discovery, and will result in substantial economy of time and money to the Court and to the parties."

Again, arguments for economy are not dispositive in these cases; but petitioner included in its brief "a more important reason"—"prior statements of witnesses under oath which may be used for the purposes of impeachment, refreshing recollection and testing credibility." (p. 7). A manifestly proper use of the transcripts; but the petitioner has failed to establish compelling necessity shown with particularity. In order to accomplish this, the proper *use* must be placed into the proper *context.*

Petitioner seeks access to grand jury transcripts during the discovery stages of the litigation. The Court recognizes that while this practice is not without precedent, *In re Sellers,* 32 F.R.D. 473 (N.D. Ill. 1962), *Consolidated Edison Co. of N.Y.* v. *Allis-Chalmers Mfg. Co.,* 217 F. Supp. 36 (S.D.N.Y. 1963), *Atlantic City Electric Company* v. *A.B. Chance Company,* 313 F.2d 431 (2d Cir. 1963), *State of Illinois* v. *Harper & Row Publishers, Inc.,* 50 F.R.D. 37 (N.D. Ill. 1969), *In the Matter of Grand Jury Investigations 69 GJ 2969 and 71 GJ 983,* 378 F. Supp. 139 (N.D.

Ill. 1974), *In re Cement-Concrete Block, Chicago Area, supra,* it is not appropriate for application to the case at bar. Although the Supreme Court has not specifically passed upon the release of grand jury testimony in connection with pre-trial discovery, this is not to say that the exceptional case does not exist whereby such a discolsure would be appropriate. Effective Court supervision would be so difficult, in such a case, however, that the need of the petitioner must be all the more compelling.

Regardless of whether the petitioner seeks access to the the transcripts before or at the time of trial, the *Procter & Gamble* showing of compelling necessity shown with particularity cannot be avoided. Neither can it be assumed. The first three cases cited above arose in the context of a massive National Deposition Program connected with a string of antitrust actions aimed at the electrical industry. Honorable George H. Boldt, sitting by designation as Special Master of the program, heard two of the cases at the trial level. In *Sellers,* Judge Boldt examined the grand jury testimony of one Brenan R. Sellers, *in camera,* and found it to contain "many facts of vital importance to essential issues . . . which were not recalled or were denied by deponent in his deposition testimony." Finding that in the nature of the case the depositions would almost certainly be evidentiary, Judge Boldt reasoned that the need for the transcript for the purposes of refreshing the witness's recollection or exposing inaccuracies in his deposition testimony "is as great now as it might be at trial" (at 477). A protective order was issued to prevent the use of the transcript for any other purpose. It's important to note in *Sellers* that Judge Boldt, therein, released *one* transcript only upon a particularized showing of need.



In *Atlantic City Electric,* Judge Boldt made similar findings on the basis of an *in camera* analysis of the single transcript of one John T. Peters. The Second Circuit affirmed, finding no manifest abuse of discretion.

Based upon what it saw as authorization in *Atlantic City Electric,* the District Court in *Consolidated Edison Company* performed an *in camera* analysis of three transcripts, found in the case of each witness either material discrepancies on important factual issues between the grand jury testimony and the deposition testimony or significant facts that the witness failed to recall at the deposition. Accordingly, the judge released only the significant portions of the transcripts.

In *Harper & Row,* the District Court for the Northern District of Illinois, upon petition, performed an initial *in camera* inspection of nine requested transcripts and found material discrepancies on important factual issues or significant facts that the witness failed to recollect. Judge Decker held that any further transcripts would be released upon a mere showing of "similar recalcitrance and unexplained failures to remember" (at 42), without the necessity of an *in camera* analysis since the reasons for secrecy were virtually non-existent. Judge Decker indicated that he was willing to go even further in providing transcripts of witnesses *expected* to be deposed, prior to their being deposed, but that such a decision would be appropriate for certification under 28 U.S.C. § 1292(b), and would result in substantial delay. Chief Judge Robson of the Northern District of Illinois, however, has gone the "extra mile" in *Concrete Block* and *In re Grand Jury Investigations, etc.;* but we are, to date, without the clear authorization of the Seventh Circuit. This Court will therefore decline to exercise its discretion in favor of re-

leasing grand jury transcripts on the basis of an anticipated need for use in the discovery stage of the proceedings. Whether, upon the taking of depositions of persons who previously testified before the grand jury, the petitioner can make the appropriate showing of compelling need for a limited pre-trial dsclosure of certain transcripts to aid in the preparation of evidentiary depositions, the Court expresses no opinion. That case is not now before us. It should be repeated that if such a showing could be made, it would be in the context of an exceptional set of circumstances. The petition for production of grand jury transcripts must, in accordance with the reasoning expressed above, be denied, with leave to file at a later date.

The Court believes that it would be entirely proper for petitioner to move for production of the requested transcripts at the time of the trial of the civil suit to use for purposes of impeachment, refreshing recollection and challenging credibility of those witnesses who had previously testified before the grand jury. At that time petitioner would be in a position to establish compelling need, for example, by pointing to a failure of memory on the part of a witness, a showing of contradiction between the testimony and reliable documentary evidence or perhaps by prevailing upon the trial court for an *in camera* examination of the transcripts to uncover any inconsistencies. This is entirely consistent with the Supreme Court's position in *Dennis* v. *United States, supra* and *United States* v. *Procter & Gamble, supra.* See also, generally: *In re April 1956 Term Grand Jury,* 239 F.2d 263 (7th Cir. 1956); *Baker* v. *United States Steel Corp.,* 492 F.2d 1074 (2d Cir. 1974); *United States* v. *Parker,* 469 F.2d 884 (10th Cir. 1972); *Allen* v. *United States,* 390 F.2d 476 (D.C. Cir. 1968).



The Court is not unmindful of the fact that the trial of the civil suit is being conducted in the Southern District of Illinois and that it would be an impossible burden to have the plaintiff therein direct its motions for production to this Court. Considering that, and the fact that the trial judge in the Southern District would be in a much better position to evaluate the propriety of any future motions, it is the judgment of this Court that *all* transcripts of the testimony of witnesses before the grand jury in *United States* v. *Champaign Asphalt, et al.,* 72-CR-67-D (E.D. Ill.), be transferred to that Court so that they may be available for the use of counsel in *State of Illinois* v. *Champaign Asphalt, et al., supra,* at the discretion of the trial judge. It is hoped that such discretion will be exercised in accordance with the views expressed herein. The Chief, Midwest Office, Antitrust Division of the Justice Department, is directed to comply. The petitioner's motion is hereby denied with respect to grand jury transcripts, without prejudice to renewal thereof during the course of trial.

### Subpoenas and Names of Witnesses

The petitioner requests the production for inspection and copying of grand jury subpoenas issued and the names of witnesses who appeared in the course of the investigation. It is clear that these constitute "matters occurring before the grand jury" under Rule 6(e), Federal Rules of Criminal Procedure, and the same views expressed above, with reference to the transcripts and documents would apply with equal force here. In fact, it might be argued that the subpoenas and the identity of witnesses go even closer to the heart of the grand jury proceedings and should thereby be afforded a greater degree of pro-

tection. Nevertheless, the petitioner has failed at this point in time to make any showing whatever, of compelling need for such material.

In an effort to be consistent with the ruling on the transcripts above, the names of grand jury witnesses would have to be available to the civil litigant at some point early in the trial to appraise the party of the identity of the available transcripts. Upon a showing of compelling necessity, as outlined above, the trial judge in the Southern District, upon receipt of the transcripts, would be authorized under Rule 6(e) to release the names of the witnesses with an appropriate protective order.

It is unknown whether the petitioner will ever be able to make the requisite showing with regard to the subpoenas issued; however, in an effort to centralize the supervision of the litigation in *Champaign Asphalt,* the Justice Department is hereby ordered to transfer the subpoenas in question to the United States District Court for the Southern District of Illinois, so that they may be released at the discretion of the trial judge therein, again, with appropriate protective orders.

It Is Therefore Ordered that the State of Illinois' Petition for Production of Grand Jury Transcripts be, and is hereby denied, without prejudice to renewal thereof during the course of trial.

It Is Further Ordered that the State of Illinois' Petition for Production of Documents be, and is hereby denied, with respect to the production of documents produced pursuant to Grand Jury subpoenas, or voluntarily submitted.



It Is Further Ordered that the State of Illinois' Petition for Production of Documents be, and is hereby denied, with respect to the production of the names of grand jury witnesses, without prejudice to renewal thereof during the course of trial.

It Is Further Ordered that the State of Illinois' Petition for Production of Documents be, and is hereby denied, with respect to the grand jury subpoenas issued, without prejudice to renewal thereof upon the showing of compelling need.

It Is Further Ordered that the respondent, Chief of the Midwest Office, Antitrust Division, is to return all documents in his possession pertaining to the grand jury investigation in *United States* v. *Champaign Asphalt Co., et al., supra,* to counsel for the respective owners so that they may be available for discovery by the State.

It Is Further Ordered that the respondent is to transfer all copies of subpoenas issue and all transcripts of testimony before the grand jury in *United States* v. *Champaign Asphalt Co., et al., supra,* to the United States District Court for the Southern District of Illinois.

It Is Further Ordered that all copies of transcripts and subpoenas released pursuant to this order to the United States District Court for the Southern District of Illinois be returned to respondent, the United States Department of Justice, Midwest Office, Antitrust Division, upon the termination of the proceedings in *State of Illinois* v. *Champaign Asphalt, et al., supra.*

Entered this 7th day of April, 1976.

/s/ *Henry S. Wise*
Chief Judge

Supreme Court, U. S.
AUG 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

**No. 76-1661**

J. L. SIMMONS COMPANY, INC., et al.,

*Petitioners,*

vs.

THE STATE OF ILLINOIS and JOHN E. SARBAUGH, Chief, Midwest Office, Antitrust Division of the United States Department of Justice,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR RESPONDENT THE STATE OF ILLINOIS IN OPPOSITION

WILLIAM J. SCOTT,
Attorney General, State of Illinois,
160 North LaSalle Street - Suite 900,
Chicago, Illinois 60601,
(312) 793-3500,

*Attorney for Respondent the State of Illinois.*

THOMAS M. GENOVESE,
THOMAS J. DEMAY,
Assistant Attorneys General,
Antitrust Division,
188 West Randolph Street - Suite 2118,
Chicago, Illinois 60601,
(312) 793-2582,
*Of Counsel.*

KEENAN PRINTING COMPANY (312) 372-0066 365

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 2 |
| STATEMENT OF THE CASE | 3 |
| ARGUMENT: | |
| I. THE DECISION BELOW IS CORRECT | 5 |
| II. THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER COURTS OF APPEALS | 8 |
| III. THE ORDER OF THE DISTRICT COURT WAS FINAL AND APPEALABLE | 15 |
| CONCLUSION | 18 |


## TABLE OF AUTHORITIES

CASES


| | |
|---|---|
| *Allis Chalmers Manufacturing Co.* v. *City of Fort Pierce, Fla.*, 323 F. 2d 233 (5th Cir. 1963) | 11 |
| *Baker* v. *United States Steel Corp.*, 492 F. 2d 1074 (2nd Cir. 1974) | 12 |
| *Carter Products, Inc.* v. *Eversharp, Inc.*, 360 F. 2d 868 (7th Cir. 1966) | 15 |
| *Gibson* v. *United States*, 403 F. 2d 166 (D.C. Cir. 1968) | 16 |
| *Green* v. *Green*, 218 F. 2d 130 (7th Cir. 1954), *cert. denied*, 349 U.S. 917 (1955) | 16 |
| *Horizons Titanium Corporation* v. *Norton Company*, 290 F. 2d 421 (1st Cir. 1961) | 16 |
| *Illinois* v. *Sarbaugh, In re Grand Jury Proceedings*, No. CR-72-67-D, U.S. District Court, Eastern District of Illinois, Danville District (1976) | 4 |

*Illinois* v. *Sarbaugh*, 552 F. 2d 768 (7th Cir. 1977) .... 5

*In re Arizona Dairy Products Litigation*, 1976-1 Trade Cases ¶ 60,910, U.S. District Court, District of Arizona, No. CIV-74-569-A PHX-CAM ..... 13

*In re Cement-Concrete Block*, Chicago Area, Grand Jury Proceedings, 381 F. Supp. 1108 (N.D. Ill. 1974) ..... 14

*In re Sugar Antitrust Litigation*, 1976-1 Trade Cases ¶ 60,934, U.S. District Court, Northern District of California, Master File No. MDL 201 ..... 13

*In re Toilet Seat Antitrust Litigation*, 1975-2 Trade Cases ¶ 60,557, U.S. District Court, Eastern Division of Michigan, Southern Division, Master File No. 75-184 ..... 14

*Layne and Bowler Corporation* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923) ..... 8

*Premium Service Corporation* v. *Sperry & Hutchinson Company*, 511 F. 2d 225 (9th Cir. 1975) ..... 15

*Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) ..... 8

*State of Connecticut* v. *General Motors Corporation*, 1974-2 Trade Cases ¶ 75,138, U.S. District Court, Northern District of Illinois, Eastern Division, No. 71 C 830 (MDL No. 65) ..... 14

*Texas* v. *United States Steel Corporation*, 546 F. 2d 626 (5th Cir. 1977) ..... 8

*United States* v. *Byoir*, 147 F. 2d 336 (5th Cir. 1945) .. 15

*United States* v. *Jackson*, 390 U.S. 570 (1968) ..... 14

*United States* v. *Proctor and Gamble Co.*, 356 U.S. 677 (1958) ..... 5



*United States ex rel., Geach* v. *Ragen*, 231 F. 2d 455 (7th Cir. 1956) ..... 16

*U.S. Industries, Inc.* v. *United States District Court*, 345 F. 2d 18 (9th Cir. 1965), *cert. denied*, 382 U.S. 814 (1965) ..... 13

STATUTES

Fed. R. Crim. P. 6(e), 18 U.S.C. ..... 4

Fed. R. Crim. P. 16(a)(1)(A), 18 U.S.C. ..... 14

Sherman Act, § 1, 15 U.S.C. § 1 (1890) ..... 3

U.S. Sup. Ct. R. 19 ..... 8

28 U.S.C. § 1291 ..... 15

MISCELLANEOUS REFERENCES

8 Wright & Miller, Federal Practice & Procedure § 2006 ..... 16

9 Moore's Federal Practice ¶ 110.13 [2] ..... 16

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*Petitioners,*

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THE STATE OF ILLINOIS and JOHN E. SARBAUGH, Chief, Midwest Office, Antitrust Division of the United States Department of Justice,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR RESPONDENT THE STATE OF ILLINOIS IN OPPOSITION

## OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Illinois, which was not reported, appears in Appendix B of the Petition. The opinion of the Court of Appeals for the Seventh Circuit is reported at 552 F.2d 768 and appears in Appendix A of the Petition.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTIONS PRESENTED

I

Whether an antitrust plaintiff is entitled to the disclosure of grand jury transcripts which have already been disclosed to and cross-delivered between civil corporate defendants in a prior criminal action where the demonstrated need for limited production to the plaintiff outweighs the residual need for secrecy.

II

Whether a decision denying access to certain grand jury transcripts entered in a Rule 6(e) proceeding by a district court other than the court of the main proceeding is a final, appealable order under 28 U.S.C. § 1291 where the decision terminates the proceedings in the district court and is not otherwise subject to review.



## STATEMENT OF THE CASE

On December 19, 1972, an indictment filed in the United States District Court for the Eastern District of Illinois charged nine highway construction companies and four of their corporate officers with violating § 1 of the Sherman Act by submitting collusive bids to the State of Illinois. On January 22, 1973, during the pendency of the criminal action, Chief Judge Henry Wise ordered the Department of Justice to permit the defendants to inspect and copy the grand jury transcripts of present or former corporate employees who testified before the grand jury. While disclosure by the Department of Justice to some defendants can be documented, the record is unclear as to the extent of several additional disclosures made by the U. S. Attorney's office in Danville. Furthermore, at least one instance of cross-delivery between the defendants has been documented. Subsequently, all defendants were sentenced on pleas of *nolo contendere* and the grand jury was discharged.

On November 7, 1973, the State of Illinois filed a civil treble damage action in the Southern District of Illinois against the nine companies named in the Eastern District indictment, plus five other companies, to recover overcharges paid by the State as a result of the conspiracy to rig bids. The complaint alleged the same activities charged in the indictment.

On July 26, 1974, the State petitioned the Southern District for an order requiring the Department of Justice to produce for inspection and copying the grand jury transcripts which had been disclosed to the defendants in the criminal case. The State also filed a request on each of the defendants to produce the previously disclosed transcripts. On December 3, 1974, Judge Harlington Wood de-

nied both the petition and the request solely on the ground that the transcripts were outside the jurisdiction of the Southern District and within the jurisdiction of the Eastern District.

On December 22, 1975, the State instituted a proceeding in the Eastern District pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure entitled *Illinois* v. *Sarbaugh, In re Grand Jury Proceedings,* No. CR-72-67-D, U.S. District Court, Eastern District of Illinois, Danville Division (1976), to obtain an order directing John E. Sarbaugh, Chief of the Midwest Office, Antitrust Division, Department of Justice, and custodian of the transcripts, to produce to the State all transcripts which had been previously disclosed to the corporate civil defendants, their officers or agents, or to any witnesses before the grand jury. Chief Judge Henry Wise invited the corporate defendants in the civil action to participate in the Rule 6(e) proceeding. At the hearing on February 26, 1976, the defendants opposed disclosure.

On May 6, 1976, Judge Wise denied the State's petition for the production of the disclosed grand jury transcripts. Because the extent of disclosure could not be accurately documented, Judge Wise assumed in his order that disclosure had been made to each eligible defendant. (Pet. App. B 10).

On June 4, 1976, the State of Illinois filed a Notice of Appeal in the Eastern District, seeking review of that part of Judge Wise's order which denied the petition for the production of grand jury transcripts. The corporate defendants moved to dismiss the appeal on jurisdictional grounds. Subsequently, the State moved to strike the appearances and pleadings of the corporate defendants as-



serting that they were merely invited to participate as *amici curiae* in the Rule 6(e) proceeding and were not parties as of right on appeal.

The Court of Appeals for the Seventh Circuit reversed and remanded the decision of the Eastern District Court. *Illinois* v. *Sarbaugh,* 552 F.2d 768 (7th Cir. 1977). The Appellate Court ruled that the defendants in the civil action in the Southern District were intervenors in the Eastern District proceeding, the Rule 6(e) action was an independent proceeding, and the order of the district court denying access to the transcripts was a final appealable order. On the merits of the appeal, the Court of Appeals held that, in the balance, the need for limited and discreet disclosure to the State for use in the civil action outweighed the diminished secrecy of the transcripts caused by the prior disclosure to the corporate defendants, and cross-delivery among defendants. The court adopted several conditions and restrictions upon disclosure to further protect any remaining secrecy.

## THE DECISION BELOW IS CORRECT

The Court of Appeals for the Seventh Circuit has judiciously followed the reasoning set out by this Court in *United States* v. *Procter & Gamble Co.,* 365 U.S. 677 (1958). The Circuit Court balanced the remaining need for continued secrecy of the transcripts against the positive need for disclosure to the State of Illinois. After detailed analysis of the specific facts of the case, the Seventh Circuit determined that the policy reasons justifying secrecy had been diminished, any remaining secrecy could be adequately safeguarded through the use of protective orders, and the State of Illinois had shown a compelling need commensurate with the degree of secrecy remaining.

The Seventh Circuit first noted that several of the policy reasons for secrecy were no longer applicable since the grand jury had been discharged and the criminal proceedings had been terminated.

With respect to the surviving reasons for continued secrecy, the Seventh Circuit correctly determined that disclosure of a witness' testimony before the grand jury to his employer diminished the need to protect the witness from reprisal by his employer. In addition, the "residual" need for secrecy based upon potential adverse effects on the witness' future relationship with other members of the industry could be adequately dealt with through a protective order.

The Court next emphasized that the existence of cross-delivery and the future need to cross-deliver among defense counsel further narrowed the remaining zone of secrecy and diluted what remained of the reasons for secrecy:

> [T]he need of joint defendants to cooperate in their common defense will often lead to further disclosures within the group of defendants in the criminal case and sometimes to those who may be added in the civil case . . . [W]hen transcripts are shared, however, the group of potential retaliators who do not know of the grand jury testimony is reduced and so is the importance of maintaining secrecy. 552 F. 2d at 775 (Pet. App. A. 12, 13).

Turning to the specific factors forming the compelling need for disclosure, the Seventh Circuit first observed that when a witness is required to testify publicly about matters previously dealt with in the grand jury, the court should permit the use of the earlier testimony "to assure the accuracy of his later testimony." 552 F. 2d at 776 (Pet. App. A 14).



As an additional need for disclosure, the Court noted that, though never decisive, a factor to be weighed was the unfairness of permitting one side of a lawsuit to have exclusive access to a storehouse of relevant facts. The court also considered that the lapse of time between the events in issue and the testimony the witnesses will give in deposition or trial was an additional factor enhancing the need for disclosure.

Finally the court determined that, under the circumstances of the case at bar, it was not necessary that the State first show an inconsistency between trial or deposition testimony and grand jury testimony. The court was concerned with the judicial waste which would attend the procedure whereby a party is required to first depose a witness; then approach the court for an *in camera* inspection; then request the district court judge to review the transcripts and determine specific instances of failure to recall, or identify impeaching material; and, if found, then to commence a second deposition so as to confront the witness with his prior testimony. The waste is more tragic under circumstances where the defendants already have the transcripts, and will know instantly during the course of deposition or trial testimony whether the transcripts have utility as impeaching or refreshing material without the need for an *in camera* inspection.

The Court of Appeals carefully reviewed each of the foregoing criteria, and struck the balance in favor of disclosure to the State where a witness is scheduled to testify at a deposition or trial, and where suitable protective orders are entered to assure that the disclosure is carefully limited without violating any of the "zones of secrecy" which might remain.

The Seventh Circuit's careful attention to protect whatever secrecy remained in the transcripts while permitting the State access to valuable prior testimony belies the Petitioners' contention that the Seventh Circuit has permitted "general discovery", without a showing of particularized need.

## THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER COURTS OF APPEALS

In the exercise of this Court's "sound judicial discretion" under Rule 19 of the Rules of the United States Supreme Court, cases that do not involve important public issues or a real and embarrassing conflict of opinion and authority between the circuit courts of appeals are not a proper subject for review. *Layne and Bowler Corporation* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923); *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

Petitioners contend that the decision of the Court of Appeals for the Seventh Circuit is in conflict with other courts of appeals as to whether transcripts should be disclosed for purposes of "general discovery". Petitioners have once again waved the red flag of "general" discovery without addressing the specific test which must be applied, and which was applied by the Seventh Circuit in resolving the issue of production of grand jury transcripts. A closer examination reveals that the decision of the Seventh Circuit is not in conflict with other courts of appeals and review by this Court is not warranted.

Petitioners first argue that the Seventh Circuit has "adopted a position in direct conflict" with that taken by the Fifth Circuit in *Texas* v. *United States Steel Corporation*, 546 F.2d 626 (5th Cir. 1977). In support, Petitioners claim that the Seventh Circuit "recognized that its decision



was in conflict with decisions of other circuits", (Petition, p. 10), referring to footnote 15 of the opinion. (Pet. App. A 18). However, as the Seventh Circuit clearly indicates in the body of its opinion, the inconsistency referred to in the footnote is one of *result*, not a conflict in the law.

Thus, the Seventh Circuit stated:

> The Fifth Circuit did recognize that the state [of Texas] might well have some inspection rights but required it to "draw a finer bead," so the disparity in the results that would be reached by that court and ours may not be as great as it appears at first. 552 F. 2d at 778 (Pet. App. A 18).

While the results of each case are different, the Courts of Appeals are in accord with respect to each of the major overlapping legal questions raised by the cases.

First, the Courts of Appeals agree that they must balance the competing interests of the continuing need for secrecy and the positive need for disclosure. However, each court must exercise some degree of discretion in balancing the specific factors present in their respective cases. Thus, since different factors are present in each case, and are accorded varying weight by the courts, different results are reached.

The courts take divergent avenues from the beginning because of one factor not present in *Texas* but clearly present in the case at bar—the element of past and future cross-delivery among the defendants.

In *Sarbaugh*, the Seventh Circuit noted that cross-delivery had taken place, and might well take place in the future whenever it would be in the best interests of the defendants. Thus, said the Seventh Circuit, the remaining "zones of secrecy" were further diminished. See, 552 F. 2d at 775 (Pet. App. A 12, 13).

In *Texas*, however, the Fifth Circuit considered binding a voluntary agreement among defense counsel to the effect that transcripts in their possession would not be cross-delivered. While the Fifth Circuit may believe that such an agreement, which was obviously formed solely for the purpose of withholding discovery from the plaintiff, realistically protects the transcripts (the agreement is rescindable at any time by counsel), its decision on the point presents no conflict since it was never an issue before the Seventh Circuit.

Second, the Circuit Courts agree that particularized need must be shown. The Fifth Circuit characterizes the argument of the State of Texas as follows:

> The State of Texas' principal position here is that factual peculiarities in this case and the general policy favoring discovery distinguish the particularized need test of *Allis-Chalmers*, so that *no showing of such need* is requisite in this instance. A subsidiary argument is that the corporate defendants' discrete possession of portions of the relevant documents provides sufficient particularized need to justify discovery under *Allis-Chalmers*. The argument runs that only when grand jury secrecy is threatened does the particularized need test come into play and that only an attempt to discover the transcripts *from the grand jury* or those under the imposed silence of Fed. R. Crim. P. 6(e) significantly threatens grand jury secrecy. When the corporate defendants have the collective transcripts in their several possessions, Texas argues, that secrecy cannot be threatened because it has already been breached, and normal discovery rules should apply. 546 F. 2d at 629. (Emphasis supplied).

The Fifth Circuit refused to accept the argument that prior disclosure to the corporate defendants completely dispensed with the necessity of showing particularized need or of utilizing the balancing test of *Procter & Gamble*,



*supra*, and *Allis-Chalmers Manufacturing Co.* v. *City of Fort Pierce, Fla.*, 323 F.2d 233 (5th Cir. 1963). The Seventh Circuit is in complete harmony with that holding. The position advanced by the State of Illinois, and adopted in part by the Seventh Circuit, was that prior disclosure to the corporate defendants formed only a factor (though a significant one) to be weighed in the balance, as part of the compelling or particularized need. Even in the face of prior disclosure, the State of Illinois conceded that particularized need must be shown. See, 552 F.2d at 774 (Pet. App. A 11).

Third, the Circuit Courts agree that prior disclosure *standing alone* is not sufficient particularized need. In the case at bar, the Seventh Circuit expressly rejected the State's argument that prior disclosure to the corporate defendants alone lifted all secrecy of the transcripts. See, 552 F.2d at 775 (Pet. App. A 13).

The Fifth Circuit reached a similar result. In *Texas*, the court theorized that a witness who receives his own transcript is no different than a corporate employer which receives a transcript of its own employee. Without analyzing to what extent the need for secrecy was in effect diminished by the prior disclosure, the Fifth Circuit held that prior disclosure standing alone was not a sufficient showing of particularized need.

It is true that the Seventh Circuit does not agree with the analogy drawn by the Fifth Circuit. Indeed, as this Court stated in *Proctor & Gamble, supra*, one of the primary policy reasons for maintaining secrecy is to protect the employee by preventing the employer for whom the employee is a "spokesman" from reviewing his grand jury testimony. It is doubtful that the Fifth Circuit has taken the position that the disclosure to a corporation of its em-

ployee's transcript does not *in some way* diminish the need for maintaining the secrecy of the transcript. Rather, it is assumed that the analytical approach of the Fifth Circuit was to determine whether disclosure under such circumstances alone constituted a sufficient showing of particularized need.

Having determined that it did not, the Fifth Circuit chose not to consider other factors which may have tipped the balance in favor of disclosure. As the Seventh Circuit pointed out, a "finer bead" approach might have changed the result. However, the law applied by the Fifth Circuit does not present a "real and embarassing conflict" with the decision of the Seventh Circuit requiring review by this Court.

Petitioner also argues that the decision of the court below conflicts with *dicta* contained in the Second Circuit opinion in *Baker* v. *United States Steel Corporation,* 492 F.2d 1074 (2nd Cir. 1974). However, the Seventh Circuit distinguished *Baker* based upon the significant factual differences of the cases. Indeed, the Seventh Circuit actually found that the rationale of the *Baker* decision supported its opinion:

> The Second Circuit, in *Baker* v. *United States Steel Corp.,* [citation omitted], has said that grand jury secrecy should not be breached for general discovery purposes. Yet the court recognized that disclosure is appropriate
>
> > "to enable counsel to perform the vital function of cross-examining a witness who is obligated for other reasons to testify publicly with respect to the same matters which were the subject of his grand jury testimony"
>
> 492 F. 2d at 1079, citing, among other authorities, *State of Illinois* v. *Harper & Row Publishers, Inc.,*



> *supra,* 50 F.R.D. at 37. Our decision is consistent with the limitation and the quoted language. 552 F. 2d at 777 (Pet. App. A 17).

Thus *Baker* supplies no conflicting authority. Nor can it be said, as Petitioners have suggested, that the *Baker* court is in agreement with the Fifth Circuit in *Texas. Baker* is factually dissimilar from both *Sarbaugh* and *Texas* because there was no prior disclosure to the corporate defendants in *Baker.*

Finally, Petitioners argue that their Petition raises a significant federal question to be decided by this Court. As framed by the Petitioners, the supposedly important federal query is whether disclosure without a showing of need impairs the functioning of future grand juries. (See, Petition, p. 16). The answer to such an exaggerated question, is, of course, in the affirmative. However, that was never the question before the lower courts, and would not be an issue before this Court. The issue in the lower courts, rather, has been whether a civil litigant should be entitled to grand jury transcripts where the reasons for the secrecy of those transcripts are no longer viable, and any remaining secrecy in those transcripts can otherwise be protected. That issue was correctly decided by the Seventh Circuit and is harmonious with other Appellate Court decisions and myriad district court decisions.*

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* *U.S. Industries, Inc.* v. *United States District Court,* 345 F. 2d 18 (9th Cir. 1965), *cert. denied,* 382 U.S. 814 (1965); *In re Arizona Dairy Products Litigation,* 1976-1 Trade Cases ¶ 60,910, U.S. District Court, District of Arizona, No. CIV-74-569-A PHX-CAM; *In re Sugar Antitrust Litigation,* 1976-1 Trade Cases ¶ 60,934, U.S. District Court, Northern District of California, Master File No. MDL 201;

Petitioners also insist that a second important federal question is whether the disclosure of grand jury transcripts impermissibly hinders a criminal corporate defendant's right to employ discovery procedures, and its right to effective assistance of counsel. Petitioners raised this argument in both the District and Circuit Courts. Neither court found the argument persuasive and neither even mentioned the issue in passing in their lengthy opinions.

Petitioners' position, of course, presupposes that the policy reasons for the secrecy of grand jury testimony were designed to protect criminal defendants, which they were not, and that criminal corporate defendants have a "right" to the discovery of transcripts under Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure, which they do not. The chilling effect on a criminal defendants' employment of discovery is no different from many other decisions made by criminal defendants during the course of a criminal case, any of which may have an impact on later damage suits by the alleged victims of the unlawful conduct. The supposed burden on effective assistance of counsel has always been cast in vague terms by Petitioners. Nevertheless, it does not reach the constitutional proportions of *United States* v. *Jackson,* 390 U.S. 570 (1968).

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*In re Toilet Seat Antitrust Litigation,* 1975-2 Trade Cases ¶ 60,557, U.S. District Court, Eastern District of Michigan, Southern Division, Master File No. 75-184; *In re Cement-Concrete Block, Chicago Area, Grand Jury Proceedings,* 381 F. Supp. 1108 (N.D. Ill. 1974); *State of Connecticut* v. *General Motors Corp.,* 1974-2 Trade Cases ¶ 75,138, U.S. District Court, Northern District of Illinois, Eastern Division, No. 71 C 830 (MDL No. 65).



## THE ORDER OF THE DISTRICT COURT WAS FINAL AND APPEALABLE

The Seventh Circuit has held that the Rule 6(e) proceeding initiated in the Eastern District Court of Illinois was an independent proceeding and that the order of the Eastern District denying access to the transcripts was a final appealable order under 28 U.S.C. § 1291. That decision does not conflict with any other federal court opinion, is in harmony with established principles of federal jurisdiction, and does not warrant review by this Court.

As well-explained by the court below, Rule 6(e) vests jurisdiction to release the transcripts solely in the Eastern District. "It is that court that has the responsibility for enforcing Rule 6(e) and maintaining the secrecy of grand jury proceedings" . . . where appropriate. 552 F. 2d at 773 (Pet. App. A 7). The conclusion is inescapable that the Rule 6(e) proceeding for disclosure of the transcripts is an independent proceeding. See, e.g., *United States* v. *Byoir,* 147 F. 2d 336 (5th Cir. 1945). Petitioners' claimed status as intervenors in the lower court proceeding only concedes and emphasizes the independent nature of that action.

The order of the Eastern District denying disclosure of the transcripts finalized all matters pending in that district, was not otherwise subject to review, and was immediately appealable under § 1291. *Carter Products, Inc.* v. *Eversharp, Inc.,* 360 F. 2d 868 (7th Cir. 1966); *Premium Service Corporation* v. *Sperry & Hutchinson Company,* 511 F. 2d 225 (9th Cir. 1975). The Seventh Circuit's rationale fully comports with the final order doctrine and is not questioned in the Petition.

Indeed, as noted by the Seventh Circuit and admitted by Petitioners, (Petition, p. 20-21), *denial orders* entered by a district court separate from the main proceeding are final decisions for the purposes of appeal, *Carter, supra; Premium, supra; Horizons Titanium Corporation* v. *Norton Company,* 290 F. 2d 421 (1st Cir. 1961); *Gibson* v. *United States,* 403 F. 2d 166 (D.C. Cir. 1968); 8 Wright & Miller, Federal Practice & Procedure, § 2006; 9 Moore's Federal Practice, ¶ 110.13[2], and may be distinguishable from orders *granting* disclosure. See, *Baker, supra,* at 1078.

The Petitioners proceed to ignore these fundamental principles of appellate jurisdiction and instead argue that the Eastern District's denial order is not yet final, but rather must be appealed later out of the Southern District. In support of this contention, the Petitioners make the curious argument that solely because both district courts are within the geographic boundaries of the same appellate circuit, the order may be appealed out of the Southern District. This wholly unsupported assertion is laid at the doorstep of this Court as the important question of federal jurisdiction worthy of review.

The fatal flaw of the Petitioners' novel argument is that they disregard the jurisdiction of the district court from which an appeal is taken. It is the jurisdiction of the district court, not the physical boundaries of a circuit, which defines and limits the jurisdiction of an appellate court to review a decision. The mere geographic location of a district court within a circuit does not automatically give rise to appellate jurisdiction. The courts of appeals can only review an issue over which the lower court had jurisdiction. *United States ex rel. Geach* v. *Ragen,* 231 F. 2d 455 (7th Cir. 1956); *Green* v. *Green,* 218 F. 2d 130 (7th Cir. 1954), *cert. denied,* 349 U.S. 917 (1955). As Judge Wood noted in



the Southern District and as confirmed by the Seventh Circuit, only the Eastern District has jurisdiction of the grand jury transcripts. The order denying disclosure of the transcripts thus could not be raised on appeal from the Southern District. Any other conclusion would require the Court of Appeals, in an appeal out of the Southern District, to rule on an issue over which the Southern District had no jurisdiction.

Petitioners cite *Baker* v. *United States Steel Corp., supra,* to support their "physical boundaries" theory. However, *Baker* did not involve or even discuss the theory. The *Baker* court held that the order *granting* disclosure was not appealable while recognizing that an order *denying* disclosure may well be immediately reviewed. Thus the finality found to exist by the court below is supported by both the Seventh Circuit's rationale and by the Second Circuit in *Baker,* although the Seventh Circuit's decision indicates that an order of the grand jury district court would be appealable regardless of whether production was granted or denied. Even assuming the rationale of the two Circuit Courts to be in slight disharmony, the result reached in this case would remain unchanged under either approach.

The Petitioners have failed to bring to this Court's attention a single case where the geographic boundaries of a circuit court have formed the basis of appellate jurisdiction. Moreover, the Petitioners admit that "[t]his Court has not had occasion to address itself to the issue of appealability presented in this Petition. . . ." (Petition, p. 19). Neither has any circuit court of appeals. Such novel questions of first impression are more properly left to the lower federal courts for their initial determination.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General, State of Illinois,
160 North LaSalle Street – Suite 900,
Chicago, Illinois 60601,
(312) 793-3500,
*Attorney for Respondent*
*the State of Illinois.*

THOMAS M. GENOVESE,
THOMAS J. DEMAY,
Assistant Attorneys General,
Antitrust Division,
188 West Randolph Street – Suite 2118,
Chicago, Illinois 60601,
(312) 793-2582,
*Of Counsel.*

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No. 76-1661

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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J. L. SIMMONS COMPANY, INC., ET AL., PETITIONERS

*v.*

STATE OF ILLINOIS AND JOHN E. SARBAUGH, CHIEF, MIDWEST OFFICE, ANTITRUST DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR RESPONDENT SARBAUGH IN OPPOSITION

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WADE H. MCCREE, JR.,
*Solicitor General,*

JOHN H. SHENEFIELD,
*Assistant Attorney General,*

BARRY GROSSMAN,
PETER L. DE LA CRUZ,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 552 F. 2d 768. The opinion of the district court (Pet. App. B1-B21) is unreported.

## JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on April 8, 1977. The petition for a writ of certiorari was filed on May 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether grand jury testimony of an indicted corporate antitrust defendant's officers and employees, which the government furnished to the firm under Federal Rule of Criminal Procedure 16(a)(1)(A), is discoverable, after the criminal proceedings have terminated, by a civil plaintiff who proposed to call the officers and employees as witnesses at trial or in depositions.

2. Whether an order by a district court denying a request for disclosure of grand jury transcripts for use in a related civil antitrust proceeding in a different district court is a final appealable order under 28 U.S.C. 1291.

## STATUTE AND RULES INVOLVED

28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Federal Rule of Criminal Procedure 6(e) provides in part:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. * * *



Federal Rule of Criminal Procedure 16(a)(1)(A) provides in part:

> * * * Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

## STATEMENT

In December 1972 a grand jury convened in the United States District Court for the Eastern District of Illinois indicted nine corporations and four individuals for submitting rigged bids to the State of Illinois for highway construction in violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1. During the criminal proceedings the government was ordered, pursuant to Fed. R. Crim. P. 16(a)(1)(A), to provide each corporate defendant, upon request, with a copy of the grand jury transcript of any of its present or former employees

whose testimony could legally bind the defendant for the alleged illegal activities. Some disclosure was made pursuant to that order. All the criminal defendants pleaded *nolo contendere*, fines were imposed, the grand jury was discharged, and all criminal proceedings have been completed. *United States* v. *Champaign Asphalt Company*, CR 72-67-D (E.D. Ill.) (Pet. App. A2, B1-B2).

In November 1973 the State of Illinois filed in the United States District Court for the Southern District of Illinois an antitrust damage suit against the nine corporate defendants in the criminal action and five additional highway contractors, based on the same antitrust violations (Pet. App. A3, B2). The State then petitioned the Eastern District for an order requiring the Chief of the Antitrust Division's Midwest Office (respondent Sarbaugh) to produce grand jury transcripts that had been disclosed to any defendants in the criminal proceedings (Pet. App. A3). Sarbaugh filed a response interposing no objection to the requested production (Pet. App. A5). The district court denied production, finding that the State had failed to establish a compelling need for grand jury materials (Pet. App. B19).

On the State's appeal, the court of appeals unanimously reversed. It held (1) that the district court's order refusing to allow discovery was appealable as a final order under 28 U.S.C. 1291 (Pet. App. A8-A9), and (2) that grand jury materials previously disclosed to the corporate defendants should be furnished to civil plaintiffs who have called the grand jury witnesses to testify at trial or in depositions (Pet. App. A16).[1]

[1]The court also held that the corporate defendants had been properly permitted to intervene in the proceeding against Sarbaugh (Pet. App. A5-A8).



The court declined to hold that disclosure to the corporate defendant eliminates the requirement that particularized need be shown (Pet. App. A13). It ruled that even though the criminal proceedings were terminated, "residual secrecy" for the disclosed testimony was necessary because of the corporation's right to disclosure under Federal Rules of Criminal Procedure 16(a)(1)(A), and the unlikelihood that a corporation would reveal the grand jury testimony except to the extent necessary for its criminal defense (*ibid.*). The court held, however, that the level of particularized need necessary to overcome this residual secrecy was diminished by disclosure to the corporate employer of the witnesses' testimony (Pet. App. A10-A12). Noting that particularized need requirements are usually satisfied when a grand jury witness testifies at trial, but that judges should not have to determine whether trial and grand jury testimony is inconsistent (Pet. App. A13-A15), the court concluded (Pet. App. A16):

> * * * a particularized need for * * * limited disclosure * * * is sufficiently shown if the corporate employer of the grand jury witness whose transcript is sought has obtained a copy of that transcript, and the witness is scheduled to be called to give testimony either at trial or by deposition on the matters about which he testified before the grand jury.[2]

## ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other

[2]The court further ruled that the limited disclosure it authorized must be restricted to a single attorney for the plaintiff who is required to keep a record showing "to whom and when each transcript or portion thereof" has been disclosed (Pet. App. A16). The transcripts may not be copied, and they must be returned when they are no longer needed for the prescribed use; and any defendant may bar any disclosure of any portion of the transcript that is not relevant to the issues in the civil litigation (Pet. App. A16-A17).

court of appeals, and raises no issue warranting further review.

1. a. Contrary to petitioners' contention, the decision below does not conflict with *State of Texas* v. *United States Steel Corp.*, 546 F. 2d 626 (C.A. 5), petition for a writ of certiorari pending, No. 76-1710.

In *State of Texas,* a federal grand jury indicted nine companies for price fixing and other violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2. All the criminal defendants pleaded *nolo contendere*. During the criminal proceeding the corporate defendants obtained the grand jury testimony of their employees pursuant to Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure. The State of Texas filed a civil antitrust action against the same companies based upon the same conduct and sought the production of the employee grand jury testimony previously disclosed to the corporate defendants. The district court granted a motion to compel production and certified the order for interlocutory appeal pursuant to 28 U.S.C. 1292(b). *State of Texas, supra,* 546 F. 2d at 628.

The court of appeals reversed. It stated that "the issue presented is whether the State of Texas must show a particularized need to obtain the grand jury documents from the defendants and, if so, whether it has made that showing in this case" (546 F. 2d at 628). It held that particularized need must be shown, and that Texas had not shown that need because

> [t]he general circumstance that another party has his own or his employees' transcript in his possession does not, standing alone, establish particularized need sufficient to overcome the need for grand jury secrecy. [*Id.* at 631.]

In the present case the court of appeals similarly held that particularized need must be shown (Pet. App. A13).



It ruled, however, that that need could be shown if the State of Illinois could demonstrate not only that the corporate defendants had copies of their employees' grand jury testimony, but that those employees were "scheduled to be called to give testimony either at trial or by deposition on the matters about which [they] testified before the grand jury" (Pet. App. A16).

In arguing that there is a conflict between the decision below and that of the Fifth Circuit in *State of Texas,* petitioners ignore the critical fact that the Seventh Circuit permitted disclosure only because of the additional factor, not invoked in *State of Texas,* that the witnesses whose grand jury testimony was sought would be called to testify at trial or deposition. In contrast, the Fifth Circuit held only that the fact that the corporate defendants had copies of their employees' testimony was not enough to show particularized need. Nothing in the Fifth Circuit's decision indicates that if the additional factor upon which the Seventh Circuit relied in this case had been presented to the Fifth Circuit, that court would have denied production.[3]

b. The decision below does not involve any novel holding or any departure from prior law, and does not open the grand jury door wider than the existing particularized need standard permits, given Fed. R. Crim. P. 16(a)(1)(A). Cf. *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 400. Since the secrecy required by Fed. R. Crim. P.

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[3]Petitioners also contend (Pet. 11) that the decision below conflicts with that of the Second Circuit in *Baker* v. *United States Steel Corporation,* 492 F. 2d 1074. As petitioners recognize (Pet. 11), however, the ruling "with respect to the disclosure of grand jury transcripts may technically be labeled as *dicta.*" An asserted conflict between a holding by one circuit and a *dictum* by another does not require resolution by this Court. Stern and Gressman, *Supreme Court Practice* § 4.3 (4th ed., 1969).

6(e) protects the identity of witnesses testifying before the grand jury, civil antitrust plaintiffs ordinarily will have to decide whether to call such persons for trial or deposition without knowing whether they had been grand jury witnesses. Only then may their grand jury testimony, as previously furnished to the corporate defendants, become available under the decision below. It is settled that the grand jury testimony of trial witnesses (*United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682) and deponents (*Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F. 2d 431 (C.A. 2); *State of Illinois* v. *Harper & Row Publishers, Inc.*, 50 F.R.D. 37, 42 (N.D. Ill.)) may be disclosed under the particularized need standard (cf. *Dennis* v. *United States*, 384 U.S. 855, 870, n. 15). There is no need for this Court to consider the application of that principle to the particular facts here.

2. The court of appeals correctly held that the order of the district court denying disclosure was appealable under 28 U.S.C. 1291. The court noted that the district court's order "'disposes of the contentions of all the parties, leaving nothing else to be decided, * * * [and] ends the controversy before'" the court (Pet. App. A9). The proceedings before the district court constituted an independent action for the production of grand jury materials against an official of the Antitrust Division, invoking Rule 6(e) of the Federal Rules of Criminal Procedure. The district court order, which terminated that proceeding, is final under 28 U.S.C. 1291.

Although the Seventh Circuit indicated that its rationale did not appear to be in harmony with that of the Second Circuit in *Baker* v. *United States Steel Corporation*, 492 F. 2d 1074 (Pet. App. A17), there is no conflict. *Baker* involved an appeal from an order granting discovery entered by the district court in which the civil antitrust action was pending. The Second Circuit left open the



question the Seventh Circuit here decided, when it stated: "We are not here dealing with an order of a different district court *denying access to the transcripts*, which conceivably could be directly or separately reviewable as a final order * * *" (*Baker, supra*, 492 F. 2d at 1078; emphasis in original).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
*Solicitor General.*

JOHN H. SHENEFIELD,
*Assistant Attorney General.*

BARRY GROSSMAN,
PETER L. DE LA CRUZ,
*Attorneys.*

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